The Children's Act

A Consultation Paper

Written comments concerning this paper should be directed to:

Dick Barnhorst
Manager, Policy Development
Ministry of Community and Social Services
3rd Floor, Hepburn Block
80 Grosvenor Street
Toronto, Ontario M7A 1E9

Requests for copies of the paper should be directed to:

Program Information
Ministry of Community and Social Services
6th Floor, Hepburn Block
80 Grosvenor Street
Toronto, Ontario M7A 1E9

Contents

4. Children in need of protection

5. Young offenders

9. Records and confidentiality

Introduction

When the Children's Services Division of the Ministry of Community and Social Services was established in 1977, legislation was identified as one of several areas of the children's service system in need of reform. Some interim legislative amendments were enacted in 1979, but they were not intended to represent long-term, comprehensive legislative change.

The law governing children's services is contained in several acts, many of which were transferred to the Ministry at the time of the formation of the Children's Services Division. Some of the problems with the existing legislation are:

- It is confusing and difficult to read
- It creates unnecessary obstacles to service providers who are attempting to respond to the needs of individual children and families
- There are inconsistencies among the various acts
- It creates incentives which cause imbalance in the service system
- Some provisions are clearly out of date
- In some areas, important legal issues are completely ignored
- In other areas, important legal issues are addressed, but the law is unnecessarily vague
- The rights of children and families are not adequately protected and
- Many matters that would be placed more properly in an act are in regulations and vice versa.

The proposed legislation will attempt to address these problems. It is intended to be a single act which reforms and consolidates all existing legislation directly dealing with children in Ministry programs, including:

- The Child Welfare Act
- The Training Schools Act
- The Provincial Courts Act (as it relates to observation and detention homes)
- The Children's Residential Services Act
- The Children's Probation Act
- The Developmental Services Act (as it relates to children)
- The Children's Institutions Act
- The Day Nurseries Act
- The Charitable Institutions Act (as it relates to children)
- The Children's Mental Health Services Act
- The Homes for Retarded Persons Act (as it relates to children).

As indicated by the title of this paper, ***we are recommending*** that the Act be entitled The Children's Act. Other possibilities include: The Child and Family Services Act; The Children's and Youth Services Act; The Child, Youth and Family Services Act; The Children's Services Act or The Family Services Act. We welcome suggestions on what the title of the Act should be.

The Act should provide a framework or minimal skeleton for the children's services system of the future. In some areas, the Act will need to be very detailed (e.g., where the rights of children and their parents are dealt with in an involuntary manner, such as in child protection proceedings in Family Court). In other areas, the Act should contain very little other than the basic legal authority needed to allow flexibility in the implementation of Ministry policies (e.g., in the area of voluntary prevention and family support services). Many of the provisions contained in the above-mentioned Acts could be placed in the regulations or handled through administrative policies and guidelines. However, any provisions dealing with fundamental matters such as philosophy, the structural framework of the legislation or the rights and responsibilities of children and families would need to be in the Act itself.

It is important to see the legislative proposals in this paper as only one part of a much more general approach to improving Ontario's children's services system. Thus, the law should be seen in the context of the many non-legislative policy, program and organizational developments within the Ministry. Throughout the paper, an attempt will be made to put the legislative proposals in this broader context.

Our proposals build upon previous legislative and policy work of the Ministry. In order to gain a more complete understanding of the background to this paper, it would be useful to read some of the other major documents prepared by the Ministry over the last few years, including: *Children's Services: Past, Present and Future*; *Funding of Children's Services in the 1980's; Child Advocacy: Implementing the Child's Right to Be Heard;* and *Short-Term Legislative Amendments*.

The purpose of this paper is to generate discussion and feedback on the future direction of children's services legislation in Ontario. In most parts of the paper we have attempted to make specific recommendations in order to focus discussion more clearly. In other parts the recommendations are more general or have not been made because of the complexity of the issues. In some cases, we felt it would be inappropriate to go into great detail when more basic, preliminary issues were left open for discussion. We welcome comments on all issues which are relevant to the proposed legislation, whether or not they are specifically raised in this paper.

As indicated in the table of contents, the paper is organized in nine chapters. In general, these chapter headings can be viewed as possible headings of the separate parts of the Act. The chapters on Voluntary Access to Services, Children in Need of Protection and Young Offenders represent the core of the paper in that they describe the three access routes by which children and families would obtain service. With the exception of secure custody, all services would be legally available to children and families regardless of whether the child is an offender or in need of protection or whether service is being sought on a voluntary or involuntary basis.

The chapters can be summarized as follows:

1. *Declaration of principles:* outlines the basic principles and goals of Ontario's children's services system which reflect the general philosophy underlying the proposals. The principles are largely derived from previous Ministry publications and policy statements (e.g. *Children's Services: Past, Present and Future*). They also reflect the Ontario government's commitment to supporting the family, as discussed in the paper entitled *The Family as a Focus for Social Policy*.

2. *The flexible service system:* suggests that the multitude of provisions in several Acts governing the establishment, licensing and funding of children's service agencies can be greatly simplified and streamlined. The number of legal entities would be reduced and various funding provisions would be consolidated.

3. *Voluntary access to services:* draws a distinction between voluntary and involuntary court-ordered routes to service. In order to remove the existing confusion regarding the meaning of "voluntary", proposals in this chapter focus on providing clear and consistent consent requirements. In addition, review of certain residential placements is suggested and various possible forms of review are discussed.

4. *Children in need of protection:* addresses matters currently covered by Part II of The Child Welfare Act. The primary emphasis is on improving the criteria and procedures for decision-making at critical stages of the child protection process, with a goal being to reform the law in ways which strike a better balance between adequately protecting children and not interfering unduly with the right of parents to raise their children.

5. *Young offenders:* in order to provide a comprehensive picture of how possible provincial legislation affecting young offenders would relate to other proposals in the paper, this chapter basically summarizes Ontario's inter-ministerial consultation paper entitled *"Implementing Bill C-61, The Young Offenders Act"* and adds some further comments on those areas which are most directly relevant to the approach underlying the Children's Act proposals. Included is a discussion of how the Ministry's secure services policy (eventually, part of the Children's Act) relates to the federal bill.

6. *Rights and responsibilities of children in care:* builds upon the existing residential standards (regulations under The Children's Residential Services Act) by highlighting certain fundamental rights and responsibilities.

7. *Extraordinary measures:* deals with three types of extreme measures which entail certain risks to children: (a) intrusive procedures (e.g. electric shock), (b) secure isolation and (c) secure treatment. The proposals regarding secure isolation and secure treatment have been included in the secure services policy. The proposals for limiting the use of intrusive procedures are largely derived from current practice and Ministry policy and are intended to provide consistency throughout children's service programs.

8. *Adoption and foster guardianship:* suggests minor changes to current adoption legislation and introduces the concept of foster guardianship as an alternative to adoption for certain children who require substitute families but for whom adoption is not feasible.

9. *Records and Confidentiality:* addresses such issues as who may have access to records and whose consent is required for the release of records. The proposals touch on some areas covered by the Krever Report on health information and the Williams Report on government records. In addition, the proposals concern issues which arise in the children's services system but which are not addressed by Krever or Williams. It should be noted that the proposals are consistent with the expected approach of Ontario's freedom of information legislation which is being developed in response to the Williams Report.

The consultation period for the paper will end April 29, 1983. In addition to welcoming written comments on the paper, we will be scheduling several public meetings through the regional and area offices of the Ministry. The consultation period will be followed by the development of a legislative bill for introduction in the Legislature, probably in the Fall of 1983.

1

Declaration of principles

Declaration of principles

The Children's Act should contain a declaration of the basic principles and goals of Ontario's children's services system to reflect the general philosophy or approach underlying the legislation. Such a declaration is especially appropriate in this type of Act which is a major revision and consolidation of several pieces of legislation. The declaration is intended to help people understand the more specific provisions throughout the Act. In situations not completely covered by these more specific provisions, the declaration can also be a useful source of guidance for decision-makers, such as agencies and judges, and others trying to interpret the Act.

The Ministry's basic approach to children's services has been clearly stated in the Children's Services Division's *Basic Principles of Service Delivery* and *Children's Services: Past, Present and Future*. ***We are recommending*** that the following statements, derived largely from these two sources, be included in the declaration:

1. Each child and each family has unique problems and responses that may change from time to time. A primary factor influencing the offer of help must be the problems and responses themselves, and not the structures and requirements of service agencies and institutions.

2. Services to children should support, enhance, and supplement the family, wherever possible, rather than compete with the family by providing alternative care and supervision.

3. The children's services system should be designed to meet a child's need for a continuous, stable environment and to promote the child's opportunity to enjoy a parent-child relationship and to be a wanted and needed member of a family.

4. Help is used most effectively when it is seen as a response to the person's or family's own perception of its needs and should be provided on a voluntary basis, wherever possible. In cases of conflict between children and parents, or between parents, due regard should be given to the concerns of each family member.

5. If either voluntary or involuntary intervention in the life of a child or family is necessary, the least restrictive or drastic alternative appropriate in the circumstances should be chosen; children should be removed from their parents only as a last resort even when parents initiate the request.

6. Any process of involuntary intervention involving a child or family should be based on a strong presumption of family autonomy and family integrity.

7. All attempts to help children and families deal with their problems must take into account developmental differences among children.

8. Services to children and families must be provided in a culturally appropriate and sensitive manner, based on a recognition of cultural uniqueness and regional differences.

9. Parents and children should be given the opportunity to be heard when decisions affecting their interests are being made and when they have questions or complaints regarding the provision of service. For serious decisions, advocates should be available to assist parents and children in making themselves heard.

10. If the fundamental interests and rights of children or parents will be affected by a decision, clear criteria and procedural safeguards are needed to define the discretion of service providers and critical decision-makers.

11. Periodic review is necessary to monitor the provision of service to children and families.

Little legislation is required to achieve many of the objectives contained in these principles; in fact, the law should be kept to a minimum so that obstacles do not inhibit or prevent decision-makers throughout the system from meeting these objectives. For example:

1. The focus on problems and responses, rather than on service agencies and institutions requires the development of a child and family-oriented system that is open and flexible. A child should have access to almost all service, irrespective of the way he has come to the attention of the system and that service should be individually tailored to meet his needs. This requires fewer legislative limitations on access to service. Other, non-legislative developments, such as more widespread use of frontline case management and the individual service contract, are also potentially important means of helping to achieve this objective.

2. To achieve the goal of enhancing, supporting, and supplementing the family rather than providing alternative care, requires a shift of resources from residential care to prevention and family-support programs such as provision of homemakers; short-term economic support; self-help training and parental relief. The new funding approach encourages such a shift by giving agencies the flexibility to move funds from residential to support services.

3. The principle of using the least restrictive or least drastic alternative reflects the general goal of keeping service provision as close to the home or community as possible, in as normal a setting as possible, and, in security terms, in the least restrictive way consistent with the safety of the child and of others. In other words, community living is preferable to institutional living, open facilities to locked facilities. The Ministry's policy of deinstitutionalization and the increased development of community alternatives should have a greater impact in this area than would any legislative provision that required a judge to be satisfied that no less restrictive alternative was feasible.

Nevertheless, since the concept of least restrictive or least drastic alternative appears throughout this paper, a definition would have to be included in the legislation. It should be noted that the paper's use of "least restrictive" encompasses the notion of "least drastic". Though the least restrictive alternative is generally also the least drastic, the two are not always interchangeable: for example, from a child's perspective, placement in a foster home may be no more restrictive than remaining in his own home with supervision. However, removing a child from his home is nearly always a more drastic solution than in-home support or supervision.

We are recommending that the least restrictive alternative principle be defined as an approach to service delivery that involves a preferential ordering of where and how services should be provided to children and families. The following variables and preferences should be applied in selecting the least restrictive type and method of service:

(a) *Place* - a child's own home is preferable to a foster home and both homes are preferred to all residences.

(b) *Location* - if the child is not placed in his own home, his residence should be as close as possible to his home community.

(c) *Access to the community* - out-of-home placements should promote physical and social integration through maximum access to community schools, recreation, and all other normal social facilities and activities.

(d) *Normalized living* - the residence should be normal-looking in appearance and surroundings as well as normal in the following internal and program aspects: furniture, clothing, food, possessions, daily routines, and social relationships.

(e) *Size* - small residences (i.e., with fewer than ten children) are preferred to larger buildings or units within buildings.

(f) *Length of stay* – shorter stays of definite duration are preferred to longer and indefinite stays, and intermittent stays are preferred to those that are continuous.

(g) *Supervision and control* – normal social means of supervision and control are preferred to physical barriers and restraints and to the use of psychotropic drugs.

(h) *Voluntariness* – services offered on a voluntary basis are preferred to involuntary intervention.

Some principles contained in the proposed declaration suggest that the law should say a great deal, for example, about the preference for services being provided on a voluntary basis. With respect to this principle, a role of the law is to clarify the meaning of "voluntary". Whose consent is required? the parent's? the child's? the child over twelve? children over sixteen? both the parent and the child? In several situations, this is an important legal issue; for example, in consent to residential placement, consent to treatment and consent to disclosure of confidential records. Alternative proposals will be presented in the "Voluntary Access to Services" section of this paper.

The law also needs to be very specific regarding the circumstances and conditions under which service can be provided on an involuntary basis. Application of the principles calling for a strong presumption of family autonomy and clear criteria and procedural safeguards when fundamental interests are at stake leads to a detailed revision of the existing grounds for involuntary intervention by a child and family service agency, as proposed later in this paper. These same principles indicate a need for the law to clarify the circumstances and conditions under which a child can be placed in long-term institutional care, when he can be restrained by locked doors and when, if ever, certain types of intrusive treatment procedures (e.g., electric shock therapy) can be used, even with the consent of the parent or child.

Similarly, if periodic review is important for monitoring provision of service to children and families, the legislation should indicate which situations warrant a review, whether the review is to be internal or external, the frequency of reviews, the authority of the review body and the criteria to be applied in reaching a decision.

Finally, the principle of recognizing cultural uniqueness requires specific legislative provisions throughout the Act. It could be argued that this principle has the greatest significance for native people whose culture and identity appear to be most threatened by our present system of social service delivery. For example, all across Canada there is a disproportionately high number of native children in the care of child welfare authorities (see the child protection section for statistics). It has also been suggested that the native child is more likely to experience frequent moves than his white counterpart and is less likely to be returned home. In recognition of these problems, some jurisdictions have enacted express legislation regarding the provision of social services, such as child welfare, to native groups. Although we are aware of the arguments for established specific legislation for native people, we also recognize that there are constitutional problems with such an approach.

Throughout the paper, an attempt has been made to indicate where specific provisions for native people would be appropriate and desirable. In addition, particularly in the child protection section, specific recommendations have been made protecting the rights and interests of native children and families in a way that would preserve their cultural identity.

2

The flexible service system

The flexible service system

In order to achieve many of the objectives in the proposed Declaration of principles, the legislation will have to provide a maximum degree of flexibility in the licensing and funding of children's services. The system needs flexibility to accommodate shifts in types of service needs resulting from such factors as demographic changes in various regions; it must allow and encourage creative responses to the individual needs of children; it must easily accommodate and put into effect changes resulting from changing views and policies – for example, a strengthening of family support and preventive measures with a corresponding shift away from residential care. It should be able to accommodate any of these changes without requiring major legislative amendment, without requiring changes in the corporate identity of the service providers, and without any lapse in the maintenance of standards. This can be done with a set of relatively simple legislative provisions, probably shorter than those they would replace, which are scattered through several Acts.

At present, there is a confusing array of hundreds of legislative provisions governing the establishment, licensing and funding of children's service agencies. The major types of agencies identified in eleven Acts administered by the Ministry include children's residences (Children's Residential Services Act); observation and detention homes (Provincial Courts Act); children's institutions (Children's Institutions Act); children's mental health centres (Children's Mental Health Services Act); homes for retarded persons (Homes for Retarded Persons Act); charitable institutions (Charitable Institutions Act); facilities and children's homes (Developmental Services Act); training schools and homes (Training Schools Act); day nurseries and private home day care (Day Nurseries Act); children's aid societies and private adoption agencies and licencees (Child Welfare Act); probation offices (Children's Probation Act).

Apart from being confusing, the existing legislation has produced a service system that in many respects, is irrational and inflexible. In some cases, the funding of a needed service has been legally impossible because the situation or service did not fit within the narrow scope and precise wording of the relevant Act. For example, the funding of a valuable program for private home day care operations was not allowed recently because the purchase of service clause in The Day Nurseries Act is limited to children already enrolled in a day nursery or in receipt of private-home day care; in this case, the program was designed to precede the placement of children in day care and thus the expenditure would not have fit within the purchase-of-service clause. Some services are made to account for contributions from other sources, while some are not and the practice regarding financial contributions from parents is very irregular. Many agencies operate under different Acts with different rules, yet provide essentially the

same type of service. The legislative mandates or main responsibilities of various agencies overlap, while in some cases no single agency feels responsible for certain hard-to-serve children. The separate Acts for different agencies also encourage the development of services based on service streams or clinical problems. This has led to providing fragmented services based more on label than need and has discouraged a more comprehensive approach to serving children and families.

In attempting to suggest a more rational and flexible service system, this chapter will focus on five major areas:

a) Decentralization

b) Major types of services

c) Licensing

d) Funding of children's services

e) Delegation of involuntary powers, where necessary

A. Decentralization

As noted in *Children's Services: Past, Present and Future*, a recent, significant change in the world of children's services was the reorganization and decentralization of the Ministry. This restructuring process was designed to move decision-making closer to the local level, to relate children's programs more closely to other programs within the Ministry, and to make the province's task more manageable. As a result, most program planning and supervision activities were decentralized to field offices across the province. Only province-wide policy and program planning, operational coordination and information systems and standards development were left at the head office level.

The legislative authority for the decentralization process is contained in the Ministry of Community and Social Services Act which gives the Minister a broad authority to delegate his powers and duties to any other person or class of persons whom the Minister appoints.

As part of the decentralization the government commenced the process of breaking down the traditional program areas, by bringing the program supervisors together in teams, across the traditional boundary lines. Now, the teams of program supervisors at the area level and their managers work across the traditional program boundaries as the first step towards real integration of services.

The flexible service system

In addition, the Ministry is promoting coordination of services by allowing communities to establish local Children's Services Co-ordinating and Advisory Groups to act in an advisory capacity to municipal governments. The purpose of the local Coordinating and Advisory Groups would be to:

- bring local services for children into proper focus in an integrated and coordinated fashion and enhance municipal ability to plan for children's services;

- help in the rationalization of service planning;

- help to develop relationships between the Ministry (regional and area) field offices and municipal governments in a trusting atmosphere; and

- assist in the development of multi-year action plans.

At this point in the development of local Coordinating and Advisory Groups, it is difficult to indicate what specific legislative provisions would be needed. However, as a minimum, ***we are recommending*** that the Act include the authority for the Minister to establish local Children's Services Coordinating and Advisory Groups and to make regulations regarding the details of their operation.

B. Major types of services

The Children's Act must provide the legislative foundation of the service system, including the identification of the major types of services. Although the current service types could be continued in the new Act, there are some advantages in a legislative reorganization of services:

- the development of more generic and comprehensive services can be encouraged and facilitated;

- unnecessary labelling of children can be avoided (e.g. "emotionally disturbed"; "retarded");

- greater freedom to re-arrange services at the local level can be made possible by eliminating unnecessary legal obstacles inherent in the several Acts now governing the service system;

- the system can be simplified by combining under one heading different programs that provide essentially the same type of services;

- new legislative titles and groupings of services can more accurately reflect their actual nature and, in some cases, changes in philosophy under the new Act.

We are recommending that the Act provide that the Ministry be able to establish or fund the following major types of services:

1. *Family Support:*
A wide variety of non-residential community programs would come under this heading, including day care, drop-in centres, prevention programs, in-home support (e.g. homemakers) and individual and family counselling.

2. *Residential Care:*
This type of service would provide basic care (i.e. a place to live) for emergency, short-term or long-term purposes. Current residential programs included would be child welfare group homes and foster homes, juvenile corrections group homes and foster homes, some children's institutions, former children's boarding homes, charitable institutions, and some residential programs for developmentally handicapped children under The Homes for Retarded Persons Act and The Developmental Services Act and possibly some children's mental health centres.

3. *Child and Family Service:*
Essentially, child and family service agencies would be the existing children's aid societies. The name would reflect the Act's emphasis on both the child and the family; it would acknowledge that this type of agency is, and probably will continue to be, the largest and most prominent (but not the only) front-line service provider. It also seems to describe more accurately the current philosophy of children's aid societies - in fact, many societies have already changed their names to indicate a child and family orientation. The characteristic that would most clearly distinguish this agency from others is that it would be the child protection agency responsible for receiving and investigating child abuse reports, apprehending children and taking them to places of safety, initiating court proceedings, and assuming guardianship or supervision of children determined by the court to be in need of protection. Its potential mandate would continue to be very broad, as now provided by Section 6 of The Child Welfare Act, including such voluntary services as adoption, prevention and family support; however, as discussed below, the exact mandate of this agency, as with the other agencies, would be negotiated with the Ministry .

4. *Child Development:*
Child development centres would incorporate programs now run by family court clinics, children's mental health centres, some training schools, some children's institutions and some facilities for the devel-

opmentally handicapped children under schedules I and II of The Developmental Services Act. They would have two principal functions: first, to plan, supervise and deliver treatment and rehabilitation programs; second, to provide clinical assessment and, in some cases, clinical consultation. In general, child development centres would have the mandate to offer a broad, comprehensive service for all types of developmental disturbances and disabilities. Thus, they would serve children with problems in sensory, motor and perceptual development as well as in interpersonal and social development. While their comprehensive approach would be broader than their predecessor agencies, some centres would continue to have a narrow mandate, providing programs for children with specific problems.

Some of the more specialized child development centres would be provincial institutes, as described in *Children's Services: Past, Present and Future*. These institutes would be the successors to today's children's mental health regional centres and children's psychiatric facilities under schedule I of The Mental Health Act. As the most highly specialized centres, they would provide support and supplementation for the rest of the service system, but with the same comprehensive approach as other child development centres. The institutes would serve a large area, either a region or the province as a whole, and would, in some cases, be provincially run. Their services would be limited to the most difficult cases that could not be handled by programs at the local community level. For example, secure treatment programs and some multi-sensory programs for blind and deaf developmentally handicapped children would be provided by the institutes. While, in general, the institutes would provide a comprehensive range of programs, some would be less comprehensive, more specialized centres for the treatment and study of particular conditions such as autism. In addition, the institutes would play an important role in providing research, general program advice, specific case consultation and staff training to other agencies.

5. *Youth work:*
Youth workers would be today's probation and after-care officers. The title is the one used in the proposed Young Offenders Act. They would continue to be responsible for a variety of activities related to young persons in conflict with the law, including supervising young offenders who have been placed on probation, preparing predisposition reports for the court and providing aftercare services to offenders who have been released from custody.

This new grouping of services is not intended to suggest that programs not currently eligible for Ministry funding (e.g. certain educational programs) would become eligible under the Children's Act.

Rather, the intent is to legislatively reorganize the types of programs currently eligible for funding in order to increase the flexibility of the service system.

For the purposes of the legislation, ***we are recommending*** that an agency receiving funds to provide a service included in one of the above five categories be identified by the relevant service category. For example, any agency funded by the Ministry to provide clinical assessment would be a child development centre. Similarly, an agency funded to provide child protection services would be a child and family service agency.

In general, an agency could call itself by whatever name it wished. For example, the Hilda Roberts Day Care Centre could continue using that name to identify itself to the general public, but would also be legislatively identified as a family support service. Similarly, the Geneva Centre, which provides treatment services for autistic children, would continue to be known generally as the Geneva Centre but would be classified by the legislation as a child development centre (instead of a children's mental health centre, as under current legislation).

Under current legislation, if an agency operating under an act wishes to provide additional services for which it will receive Ministry funding, it is often required to seek an approval for funding under a separate piece of legislation. In some cases, before the Ministry approval can be granted, supplementary letters patent are required to broaden the objects of a funded corporation and thus bring it within the provisions of the relevant Act. The broad legal definition of services, proposed above, would allow agencies freedom to change the services they provide. There would be considerable potential for an agency to broaden or narrow its mandate (i.e., the range of services it provides) with few, if any, legislative restrictions. ***We are recommending*** that an agency be permitted to provide any of the services included in its service category. For example, a child development centre might only provide residential treatment in its first year. In the following year, it might decide to add clinical assessment, day treatment and out-patient programs to its repertoire of services. Another child development centre might serve only mentally ill and emotionally disturbed children in its first year. It might then decide in the second year, to broaden its clientele to include mentally retarded and learning disabled children. These various combinations easily fit within the scope of a child development centre. In addition, ***we are recommending*** that an agency be permitted to provide more than one of the five major types of services. For example, an agency could

be both a child development centre and a family support agency; or an agency could be a child and family service agency as well as a youth work agency.

There would, of course, need to be some limits built into this approach to the establishment of services. ***We are recommending*** that the legislation provide for some general rules for each of the major service types in order to regulate who could receive funds to provide one of these services. At present, regulations under the various existing Acts contain rules relating to types of corporations, boards of directors, staff qualifications, child-staff ratios, physical plant requirements and how certain services are carried out (e.g., child abuse standards under The Child Welfare Act). Similar types of rules for the five major service types would be developed and contained in the regulations under the new Act. For example, child and family service agencies would probably have basic rules the same as today's children's aid societies. Other service types, such as family support, would, in general, have relatively few and simple rules, broad enough to cover the wide variety of support services included within this category. A major goal would be to reduce the existing rules to those that are truly essential.

Although most rules would be of the traditional type (e.g., profit or non-profit corporations) some new rules would need to be developed in order to implement the underlying principles and objectives of the new Act. For example, in keeping with the general principle of delivering services in a culturally appropriate and sensitive manner, ***we are recommending*** that, where native children and families are served in sufficient numbers by one agency, the agency's board of directors should include native people representative of the local native community. There are currently precedents in Ontario for this approach. Many boards of children's aid societies now include native representation and The Education Act specifically permits local band councils to appoint Indian representatives to the school boards. The names of the proposed native representatives should be submitted by local native organizations. In addition, ***we are recommending*** that the Ministry have the authority to establish an Indian child and family service agency to serve Indian children and families living on a reserve. Before establishing such an agency, the Ministry would ensure that it fits within the agreement with the federal government regarding the provision of child welfare services to native people.

Although nearly all services currently funded, directly or indirectly, by the Ministry would fall within the activities of one of the major service types, some might not. For example, some juvenile diversion programs or a research study conducted by a private social science research firm would not fit neatly into any of the five categories.

Therefore, ***we are recommending*** that miscellaneous services that do not fit into the major service types be covered by the Minister's power to purchase services for children and families, as proposed below.

Clearly, the five general titles of service will not be sufficient for all purposes of the Act. ***We are recommending*** that more specific titles be used at various points throughout the legislation. For example, in the section dealing with young offenders, there would have to be a reference to secure custody facilities. The Act could simply define a secure custody facility as a child development centre or residence designated to provide secure care. Observation and detention homes, secure treatment units and places of safety are other facilities that could be handled by designation.

C. Licensing

As noted above, an agency providing one of the major types of services would have considerable freedom to change its mandate. One limit on this freedom would be the need to obtain a licence in order to provide certain services. For example, a family support agency wishing to add day care to its services would need a day care licence; a non-residential child development centre wishing to provide residential treatment would require a residential care licence.

In general, the present licensing system would be continued. As now, licensing would not carry with it a guarantee of funding. Failure to meet standards would result in the Ministry's refusal to grant a licence; failure to maintain standards could result in the suspension or withdrawal of a licence. There would be a single procedure for appealling a licensing decision, the same appeal now available under The Children's Residential Services Act. The Minister would continue to have an emergency intervention power, regardless of whether a licence has been withdrawn, for the purpose of protecting children whose health or safety was in danger.

Currently, the vast majority of children's services can be provided without a licence. This will probably continue. However, in order to provide the flexibility for an expansion of areas subject to licensing requirements, ***we are recommending*** that the Act give the Minister the general authority to make, by regulation, categories of licensable services. Licences would be required only for services for which written standards have been developed. Where an activity is licensable, the Ministry could purchase the service only from a licensed provider.

The goal would be to keep the number of licensable areas to a minimum. At present, the only services requiring a licence are residential care, private adoption and day care. These activities would continue to be licensed. A foster care placement service is an example of an additional area which might be licensable in the future, as proposed in the Foster Care consultation paper.

Other than in these areas, an agency could enter a contract with the Ministry without obtaining a licence. For example, a child and family service agency could receive funds to provide child protection services, adoption services and a wide variety of prevention programs without a licence. However, if the Ministry and the agency also wanted group home services to be included in the funding agreement, the agency would be required to have a residential care licence.

Finally, the Ministry would remain responsible for setting the licensing standards (e.g., physical plant; staff qualifications) and ***we are recommending*** that the Act clearly state that the same standards apply whether the service is provided by a licensed agency or is carried out directly by the Ministry (which will not issue licences to itself).

D. Funding

As discussed in *Children's Services: Past, Present and Future*, the most major recent change in the area of funding has been the Ministry's development of a new approach to paying agencies for their services. The details of the new funding approach have been published separately (see *Funding of Children's Services in the 1980's*). However, it is worthwhile summarizing some of the principal elements here. First, there would be a move away from line-by-line budgeting and a move toward a service planning approach that enables the Ministry and the funded agency to develop short and long range plans and then allows funds to be provided in accordance with those plans. The service planning approach allows discussion about those issues that ought to be discussed, i.e., goals and objectives expressed in concrete terms so that funds can be provided to meet them. It gives a great deal of freedom and allows for incentives to move funds in the directions we have suggested in the Declaration of Principles (e.g., from residential to non-residential service). Agencies will be able to plan over a longer period of time and will be able to develop approaches that generate savings that can be used for other areas of priority. Another element of the new funding approach is that it allows services to be classified in a way that permits comparisons across the

services and allows for a new approach to the allocation of funds to regions and areas, in a way which helps to achieve equity.

This new approach to funding provides much more flexibility to agencies to manage programs and allocate resources as they see fit. At the same time, it permits the province to maintain a strong influence in the direction of policy and program priorities, though not line-by-line control. The approach is currently being put into effect under current legislation with children's aid societies and children's mental health centres, and it is expected that it will be extended to other types of agencies over the next few years.

The introduction of the new funding approach has taken place with very little legislative change being required. However, there are some legislative amendments needed to complete the transition to a more rational and flexible funding system. As noted above, the funding of children's services is now governed by a variety of detailed provisions contained in several Acts and the regulations under them. These various pieces of legislation were passed over several years in response to specific situations and needs, without any broad, overall funding plan in mind. As mentioned earlier, this process has resulted in legislative anomalies and inflexibilities.

We are recommending that the multitude of funding provisions scattered throughout the several existing Acts be replaced by a broad authority of the Minister to fund services for children and families within the scope of the Act. This authority would include the power to fund services provided directly by the Ministry as well as services provided by independent agencies, and the general power to ensure accountability regarding the use of funds.

The legislation would also allow introduction of policy changes which are being developed in other areas. First, a consistent approach to when financial contributions from parents should be required is being developed. An example of the current inconsistency is that, regardless of income, parents make no contribution when their child is in a children's mental health centre while parents receiving service from a children's aid society may or may not be required to make a substantial contribution depending on the society involved. A general policy has been developed with respect to services for developmentally handicapped children - that parents should not be expected to pay for costs generated by a child's special needs but they can be expected to contribute to basic care costs. The amount of the contribution would be on a sliding scale basis determined by the parents' income. The intention is to eventually introduce this approach across all children's services. Second, the Ministry has recently introduced new approaches to

the raising of charitable contributions which are designed to eliminate all disincentives to raise such contributions. Work is ongoing to develop a consistent approach based on the experiments now underway in such areas as children's mental health centres, children's institutions and services for developmentally handicapped children.

In order to allow the potential for a rapid response to changing needs at the local level, ***we are recommending*** that the Ministry have a maximum degree of flexibility in determining who will receive funds to provide services and under what terms and conditions. More specifically, the Ministry could purchase service from any agency for any length of time agreed to by the parties, subject to the following limitations:

- as noted earlier, if the provision of the service requires a licence, the service could be purchased only from a licensed agency;

- if one of the major types of service is to be funded (e.g. a child development centre), the Ministry must be satisfied that the applicant meets the general rules applicable to that type of service, discussed above; and

- all services mandated by law must be provided.

This fairly simple legislative funding approach should provide benefits for the Ministry, the service providers and the children and families being served. It offers the Ministry the possibility of a wider range of choice in purchasing services, including the option of trying new configurations of services through a consolidation of some services within one agency or through entering separate contracts with several different agencies. On the other hand, as mentioned earlier, existing agencies would have the opportunity to broaden their mandate or repertoire of services with few, if any, legal obstacles. The net result for children and families should be a local service system better able to respond to their individual service requirements.

Under this funding system, the Ministry and a child and family service agency, for example, could negotiate a contract based on a service plan for the provision of child protection services, adoption and foster care placement services and a variety of family support services. Near the end of the contract, the Ministry and the agency might renegotiate the agency's mandate. For example, they might decide to expand the mandate by a new service plan that called for the agency to become the youth work agency for the area. Similarly, the committee could negotiate a service plan for an agency to provide a homemaker

service and emergency, short-term and long-term residential care. A subsequent plan might change the mandate by providing that one of the emergency and short-term residences be funded as a semi-secure observation and detention home. At the same time, the Ministry and agency could agree that the homemaker service should be handled by a different agency. The Ministry might then give the homemaker contract to a family support agency, licensed to provide day care, that was interested in developing a broader range of services. In addition, the broad purchase of service authority could be used on behalf of the child, to put together a "package" of services provided by several different agencies. It could also be used to provide certain specialized services to meet the specific needs of the local community. For example, where there is a native child and family service agency, the Ministry could negotiate a separate service plan with that agency.

As with the existing legislation, most of the necessary details supporting the Ministry's general authority to fund services would be contained in the regulations or by administrative practice rather than in the Act. These details are now the subject of ongoing work within the Ministry on funding policy and therefore this chapter does not contain a complete description of what this supporting detail might be. However, some general comments can be made. ***We are recommending*** that the legislation in general terms require that the Ministry purchase such services as may be required to carry out orders made by a court or a placement review body (discussed in Chapter 3). These services would include a variety of non-residential (e.g., counselling), residential, youth work, detention and child protection services. This is the least the legislation should contain by way of specifying mandatory services - those services that must be provided in each local area. Though these services would be considered mandatory, there would still be great potential for flexibility in the way the service was actually provided. For example, under the Young Offenders Act, residential places of custody will be required to accommodate youth court orders but the meaning of place of custody is so broad that a variety of residential settings could satisify the requirement. Similar flexibility would be possible within the meaning of child protection services.

The Ministry, at this time, has no intention of changing existing cost-sharing arrangements. It should also be noted that the same funding approach would not necessarily be used for all services within each of the major service types, mentioned earlier. The advantages of a legislative reorganization of services, noted earlier, can in large part be achieved without changes in cost-sharing.

E. Powers

Under the new Act, there would continue to be certain persons or agencies needing some extraordinary coercive or involuntary powers to carry out their tasks. For example, the child and family service agency, as part of its child protection role, would have to be able to make an emergency apprehension of an abused or neglected child and to take the child without the consent of the parents to a place of safety. Similarly, a residential care agency under contract to provide secure detention services would need authority to use locked doors to detain young persons accused of committing serious offenses. ***We are recommending*** that these special powers transfer to the agency at the beginning of the contract and continue for the life of the contract. For example, if the Ministry decided not to renew a secure detention contract with agency "A" and entered a new contract with agency "B", the latter agency would be designated as the secure detention facility and the necessary, involuntary powers would automatically transfer. Similarly, as in the example on page 19, the Ministry could decide to give the youth work contract to the child and family service agency. In that case, both the designation and the traditional probation powers would transfer as part of the new contract. In short, the involuntary power would shift when the funding changed. There would not be a need to separately list in the Act or regulations all of the powers that accompanied the various designations because the required authority would be specified at appropriate points in the Act.

Only agencies under contract with the Ministry would receive these special powers. In other words, although an agency, such as a licensed residence, might obtain independent funding to provide residential care, the independent funder would not have the authority to grant the powers necessary to allow the agency to operate as an observation and detention home.

F. Summary

In summary, the Act should provide for:

1. The establishment of local children's services Coordinating and Advisory Groups.

2. The establishment of five major types of services: family support, residential care, child and family service, child development, and youth work.

3. The potential for an agency to broaden or narrow its mandate with a minimum of legislative restrictions.

4. The licensing of certain categories of service as determined by the Minister.

5. A simple, broad authority for the Ministry to fund services for children and families within the scope of the Act.

6. A maximum degree of flexibility for a Ministry in determining who will receive funds to provide services, subject to certain licensing provisions and general rules applying to the major type of services.

7. The granting of certain extraordinary, involuntary powers where needed by an agency to carry out its role under the contract with the Ministry.

3

Voluntary access to services

Introduction

Most children and their families would come into contact with the children's services system through the voluntary stream. Since it is important that the law clearly distinguish between the voluntary and the involuntary, or court-ordered, routes to service, a major purpose of this part of the paper is to specify what "voluntary" would mean in different situations. The voluntary stream would, for procedural purposes, be divided into two categories: support services and long-term residential care. Support services would be defined as all non-residential services to children and their families and all short-term (defined later) residential placements of children; long-term residential care would cover all long-term, non-court-ordered, residential stays, regardless of the purpose of the placement.

A wide range of both non-residential and residential services would be accessible through the voluntary stream: everything from prevention and family support programs to residential treatment would be covered by this part of the legislation. Service providers would, as now, include self-help groups, private board-operated agencies, specialized facilities, and government-operated programs. For example, agencies such as family service associations, youth work agencies (e.g. diversion and delinquency prevention), child and family service agencies, associations for the mentally retarded, and child development centres all would be involved in providing services on a voluntary basis (i.e., with the consent of the family).

It should be stressed that the existence of separate access routes, children in need of protection and young offenders, does not mean these children and their families would be prevented from using the services described in this section. On the contrary, many services available to young offenders and, in particular, to the families of children in need of protection would continue to be offered on a voluntary basis. The reason for separate access routes in the legislation is to clarify the *procedural* differences between voluntary and involuntary intervention, not to restrict access to services or to establish parallel service systems. For example, a group home could, as now, accept children on both a voluntary and court-ordered basis. As well, a support service such as a homemaker, could be ordered by the court (e.g. as part of a supervision order), in addition to being available to families with their consent. The important point to remember is that this part of the legislation would cover only the voluntary route to services. Involuntary, court-ordered, access to the same services will be described separately in the sections on children in need of protection and young offenders.

Another purpose of this part of the paper is to clarify and consolidate existing legislation relating to support and residential services. At present, the legislative provisions pertaining to residential care are contained in a number of different acts (e.g., The Residential Services Act, The Developmental Services Act, The Children's Mental Health Services Act). Although there is no single piece of legislation dealing with support services, some references to these services are currently scattered throughout existing acts (e.g., The Child Welfare Act, The Developmental Services Act). For both residential and support services, there appears to be a need for greater legislative consistency and clarity. It should, however, be pointed out that the funding and licensing of support and residential services, as indeed all funding provisions, would be dealt with in a separate part of the legislation and will thus not be addressed in this section of the paper. (See the chapter on "The flexible service system").

It is worth repeating that legislation and legal procedures would, for the most part, play a minimal role in the voluntary stream, particularly in the case of support services. Many of the desired changes to the children's services system can, and probably should, be brought about by non-legislative means. For example, the day care policy paper introduces a number of new initiatives that require no legislative changes at all. By the use of funding incentives and support for pilot projects, informal child care arrangements will be promoted and access improved for families in the greatest social and financial need. The role of legislation here is merely to provide a flexible funding framework to allow the policy to be implemented.

In conclusion, it should be emphasized that the legislation pertaining to voluntary access should be as broad and flexible as possible, to allow for the development of a variety of approaches to the provision of services. Consequently, the legislation would facilitate the creation of new services as needed.

The rest of this chapter will cover the following areas pertaining to voluntary access to services:

- consent requirements;
- support services;
- admission to long-term residential care;
- response to service denial.

A. Consent requirements

The question of consent, although central to the voluntary stream, is one of the most difficult in the field of social and legal policy for children. First, it must contend with the competing principles of family autonomy and individual freedom, particularly where older children are concerned. Second, there is substantial confusion about the capacity of children to consent. While adults of normal intelligence are presumed to have the necessary capacity to consent, children are usually thought to lack the competence or cognitive capacity to consent to important decisions. Consequently, an ongoing issue is whether a specific age should be set at which a person is presumed to have capacity or whether the competence question should be dealt with on an individual-by-individual basis. Furthermore, if a specific age is chosen, what should that age be? Researchers have concluded that most children have the capacity to consent to medical treatment by the time they are sixteen, and probably before. These findings coincide with the trend in several jurisdictions toward lowering the age of consent. For example, in Quebec children fourteen years of age can give a valid consent to medical treatment by physicians in institutions. As well, in a number of other jurisdictions children twelve and over have a right to consent or object to admission to a residential treatment setting.

In Ontario, the law pertaining to the consent of minors is unclear and confusing. As a result, service providers are frequently uncertain as to whether they are permitted by law to serve children without their parents' consent. The situation most likely to pose problems for service providers, such as counsellors or therapists, is that of an adolescent who, in seeking a service for himself, specifies that he does not want his parents to know that he needs help. Service providers may thus be placed in the unenviable position of having to decide whether to serve the child anyway, without the parents' consent, or to contact the parents and possibly risk not having the child receive a needed service. Greater legislative clarity would, in such situations, benefit all the parties involved.

Contrary to popular belief, the law does *not* specify a particular age above which a doctor may safely rely on a patient's consent. In practice, professionals tend to err on the side of caution and require the consent of parents or guardians for children who may, in fact, have the ability to consent. This practice has been reinforced by a regulation under The Public Hospitals Act that requires parental consent to surgical procedures on unmarried minors under sixteen. It has been noted that this regulation has given the medical profession the incorrect impression that a child under sixteen may not be treated without parental consent. In fact, the regulations are limited in their effect to

public hospitals. However, although the law remains unclear, there have been some court decisions that suggest a person of any age may consent or refuse to consent if he is able to understand the nature and consequences of the proposed treatment. In the absence of legislative clarity, it appears that the age of consent is gradually being lowered. The question of consent is further complicated by the fact that, in practice, a child's consent has traditionally not been required, even for major decisions, since parental consent has been considered sufficient. It has always been assumed that parents generally act in the best interests of their children and that, subject to child protection laws, they should have the authority to raise and control their children as they see fit. In recent years, however, increasing attention is being paid to the view that, as children grow and develop, they should be given more responsibility and greater freedom, and gradually allowed to take on many of the obligations and rights of adulthood. The right to consent, or at least to be heard, is frequently cited as an example.

This Ministry has clearly taken the position that children, especially older children, should, at the very least participate in decisions which affect their lives. For example, the present Child Welfare Act requires the consent of children twelve and over for voluntary care-by-agreement. As well, as indicated in the proposed regulations to The Children's Residential Services Act, the Ministry has assumed that children sixteen and over should be able to consent to services on their own. Questions about the extent to which younger children should be involved in decision-making and when, if ever, a child's consent should be required for non-residential services are still unresolved. Several options are discussed later in this section.

In conclusion, it bears repeating that services through the voluntary stream may be provided only if the required consents are obtained. Thus, the role of legislation here would be to specify whose consents would be needed under which circumstances. It should be noted that "consent", as used throughout this paper, is presumed to include the usual legal elements of capacity, information, and voluntariness. Furthermore, the consent requirements would, at the present time, apply only to services within the jurisdiction of the Ministry of Community and Social Services and would not limit medical decisions made in accordance with Ministry of Health regulations. However, it is hoped that consideration will be given to applying the approach to health programs as well.

The remainder of this section of the paper looks at consent requirements in the context of various service situations (e.g., provision of support services, admission to long-term residential care). In most cases, the recommendations follow a discussion of alternative proposals. Since the consent issue is such a difficult and controversial one,

we are particularly interested in your reactions to the recommendations and options that follow.

Consent requirements for support services

There are three distinct approaches to the question of whose consent should be required for the provision of a service, namely, the parents as sole consentors, the parents and child as co-consentors, and the child as sole consentor. Obviously, some combination of the above is also possible, depending on the circumstances. It should be remembered that the legislation would define "support services" to include all non-residential services, as well as short-term residential stays (to be defined later).

The first option would be to require the parents' consent, only for the provision of all support services. Even though this approach would not grant the child decision-making authority, it could be strengthened by requiring in law that consideration also be given to a child's views, whenever these can be ascertained.

An alternative proposal would be to require the consent of both the parent and the older child (i.e., twelve and over) for the provision of a support service. While appearing to meet the child's developing need to be involved in decision-making, this approach raises some difficult questions. For example, what should happen if the child refuses to consent? Would the child's objection mean that the service could not be provided? Would a second professional opinion be required? Another problem stems from the fact that there are a number of services in the support category for which the child's consent may be either unnecessary or clearly inappropriate (e.g., homemaking services, parent training programs, financial subsidies). Requiring the child's consent for such services may create unnecessary obstacles and infringe on the parents' right to seek services for themselves. Not only is there no probable risk to the child, but the child is not directly affected by the provision of such support services.

In contrast, the situation is more complicated when the proposed service entails some risk of harm or intrusion for the child (e.g., outpatient therapy, behaviour modification) or when the child is the direct recipient of the service (e.g., after-school program, short-term residential placement). It would seem more reasonable to require the child's consent for these services than for those that only indirectly affect the child. Unfortunately, it is extremely difficult to differentiate in law between the various types of support services. However, even where a distinction can be drawn (e.g., between residential and non-

residential), requiring the child's consent may not be desirable. For instance, for short-term residential stays, the disadvantages of cumbersome and time-consuming procedures may outweigh any potential benefits to the child. Finally, the intrusive procedures part of the legislation (see p. 108) would introduce protections for children proposed for certain kinds of treatment methods. It may be redundant to require the child's consent in addition to the legislative safeguards specified later.

The third approach would be to require the child's consent only. While this should be considered a serious option for children sixteen and over, it would probably not be desirable for younger children. For one thing, requiring the child's consent only may weaken the parents' role as primary decision-makers for the child. As well, since the support services category includes short-term residential placements, it would mean that a child could admit himself to residential care without his parents' consent. It could be argued that, if the problems in the home are serious enough to warrant temporary separation of the child and his parents, the child or someone on his behalf should contact a child and family service agency.

In view of the above considerations, ***we are recommending*** that the parents' consent only be required for the provision of support services to children under sixteen, but that the views of the child, whenever they can be ascertained, also be taken into account. ***We are also recommending*** that children sixteen and over be able to consent to support services on their own.

Another option would be to require parental consent only for the provision of support services to children up to the age of eighteen, but to allow "emancipated" 16 and 17-year-olds to consent for themselves. The concept of "emancipated minor" was developed in the United States for the purpose of exempting certain minors from the requirement of parental consent to treatment. The usual indices of emancipation include: marriage of the child; establishment by the child of a domicile other than the parents'; or establishment of economic independence from his parents. This approach assumes that married minors and those living independently of their parents are capable of consenting to services on their own. However, it would be argued that the notion of emancipated minor discriminates against 16 and 17-year-olds who, although living with their parents, are capable of consenting. We would especially welcome your comments regarding this approach.

As mentioned earlier, service providers are concerned about serving a child without his parents' consent. Acceptance of the above recommendations would mean that a support service could be provided to a

child under sixteen with his parents' consent only. However, it could be argued that this is an overly restrictive provision since there may be considerations other than risk or intrusiveness that suggest the child's consent should be required. One of these is his right to privacy. To require the consent of the parents only for all support services means that the child would never receive a service without his parents' knowledge. It also means that a child would not, for example, seek counselling for a sex, drug, or alcohol-related problem without his parents' consent. There may be situations in which a child does not want his parents to know he is seeking help or the parents refuse their consent. If the child is old and mature enough to identify his need for assistance, it would seem reasonable to allow the child to initiate the provision of the service, without the requirement of parental consent and with a guarantee that his privacy will be respected. However, there is clearly a need to limit the services to which a child may consent on his own. One approach would be to allow the child to consent to counselling without the parents' consent or knowledge. This position attempts to balance the competing interests of parental autonomy and the child's desire to make certain choices for himself. Although most children would probably discuss their problems with their parents, there are others who would be deterred from seeking help lest their parents should find out. Therefore, ***we are recommending*** that, where a child twelve or over initiates the provision of counselling services, his parents' consent would not be required. However, ***we are recommending*** that the counsellor be required to discuss with the child the desirability of informing or involving the parents. If the child refuses, the counsellor would have an obligation to respect the child's wishes, subject to child protection reporting laws.

Consent requirements for admission to long-term residential care

With the exception of residential placement under the care-by-agreement provisions of The Child Welfare Act, which require the consent of children twelve and over, a child is now not required by legislation to consent to admission to residential care.* Under present practice, a child may be admitted to most residential facilities with his parents' consent and on the recommendation of a professional if the admitting facility is willing to accept him. Although many facilities would probably prefer to admit only those children who agreed to the admission, the consent of the child is not required by law. The proposals that follow would apply to all long-term voluntary admissions, including placement in mental retardation or mental health

**Note: The proposed regulations to The Children's Residential Services Act also require the older child's consent.*

facilities, group homes, children's boarding homes, as well as to all admissions under care-by-agreement.

We are recommending that the parents' consent only be required for the admission of children under twelve years of age to long-term residential care, but that the child's views, where ascertainable, be taken into consideration. As discussed later, certain admissions may also be subject to a third party review.

Although we have not recommended that the consent of the child over twelve be required for short-term residential placements, it is an option for admission to long-term care since this is a potentially more serious decision. Again, the following are all possibilities for the admission of older children: the parents' consent only, both the parents' and the child's consent, and the child's consent only. It should be pointed out, however, that the person consenting is not necessarily always the decision-maker. In other words, a person's consent may be a necessary, but not a sufficient, condition for the provision of a certain service. Admission to a secure treatment unit serves as an example here (see p. 136). Children may be admitted to these units only with their parents', or substitute parents', consent. However, even then, admission is not automatic since a court hearing must be held to determine whether a child should be admitted.

One argument for including the consent of the child over twelve is that requiring parental consent only would not be consistent with present legislative provisions under care-by-agreement. For example, there is little essential difference between the parents' decision to place the child directly in a residential facility and the decision to place a child in the same facility after the parents and the child and family service agency have decided that the child should come into care. It should be remembered, however, that the agency could bring the matter to court if the child refused to consent to care-by-agreement.

On the other hand, it is sometimes argued that children who are proposed for admission to residential treatment should not, because of the nature of their problems, be asked to consent to admission. However, such an argument is relevant only to the extent that it raises questions about the child's competence to consent. It should probably not be assumed that children who are proposed for admission to a mental health or mental retardation facility are necessarily less competent than children of the same age who are proposed for admission to other residential settings under care-by-agreement.

Possibly a stronger argument in favour of keeping the present consent requirements is that many other decisions of this sort, in practice,

now require the parents' consent only. For example, the parents' consent is sufficient for decisions regarding hospitalization for a medical problem and admission to a private boarding school. Furthermore, legislative consistency could also be achieved by removing the existing consent requirements for care-by-agreement.

To counter these arguments, it should be stressed that the importance of this issue does not stem primarily from the need for greater consistency in legislative provisions. Rather, as stated earlier, this Ministry is committed to the belief that it is important for children to be involved in decisions that affect their lives, particularly if the decision may have serious consequences for the child. In the case of older children, "involvement" might properly be construed to include participation in decision-making and perhaps even the child's consent as a requirement for service provision. Furthermore, it could be argued that long-term admission to a residential treatment facility is a more serious decision than admission to a boarding school or hospitalization for a medical problem. (The risks to the child associated with long-term residential placement are discussed in a later section.)

Assuming that the child should have a voice in the admission process, a second option would be to require the consent of both the child twelve and over and of his parents. However, if the care-by-agreement provisions were adopted for all residential admissions, it would mean the child could not be admitted if he did not consent. The problems with such an approach are obvious. For one thing, it would probably necessitate the creation of an involuntary admission procedure or the use of child protection proceedings since there would continue to be situations where a child should be admitted, even if against his will. More important, perhaps, it is questionable whether children, even older children, should be granted an outright power to veto their parents' decisions. ***We are recommending*** that the consent of the child between the ages of 12 and 15 and of his parents be required for long-term admission, and that a review of the admission decision be conducted by a third party whenever the child's consent cannot, for whatever reasons, be obtained. In this way, the child's objection would not be treated as a veto, nor would it necessarily result in his not being admitted, yet it would have some legal effect. (Third party reviews are discussed in more detail later.) ***We are recommending*** that children sixteen and over be able to admit themselves on their own consent. In other words, parental consent would not be required.

In addition, ***we are recommending*** that the parents' consent only be required for the provision of services to children under sixteen while in residential care, subject to the provisions for limiting the use of intrusive procedures (introduced later).

Even though residential treatment is considered a more serious form of intervention than non-residential services, the consent of the child over twelve to specific services while in residential care is probably not necessary. We are recommending that the older child's consent be required for admission to residential care; this, it could be argued, includes the services provided in the residential facility. If that option were accepted, the child who consented to admission in the first place could withdraw his consent to admission if he objected to specific services. As well, children in residential care would be granted other procedural protections that would probably render their consent to services unnecessary. As discussed later, certain procedures, identified as "intrusive" (e.g. some forms of aversive conditioning) would need, not only the parents' consent, but also, would be subject to a special review mechanism. (See also Chapter 6 for a description of the proposed rights and responsibilities of children in residential care.)

We are recommending that the consent requirements for admission also apply to transfer and discharge decisions for children admitted via the voluntary route. For example, a child twelve and over could not be moved from one group home to another without both his and his parents' consent. For children under twelve, the parents' consent only would be required. It should, however, be noted that the above consent requirements would not apply to children admitted to residential care under a court order (i.e., children in need of protection and young offenders). In other words, neither the parents nor the child would be required to consent to admission if a court ordered residential placement for a child.

Ensuring a valid consent

For the above consent requirements to be meaningful, both the child's and the parents' consent or refusal to consent should be informed and voluntary. In order to increase the likelihood of a valid consent, ***we are recommending*** that the child be given a reasonable opportunity to speak to an independent advocate prior to signing a consent form. Although the child's advocate would not necessarily be a lawyer, he would have to be independent of the parents and the agency or facility. For example, a teacher, a clergyman, a worker from another agency, or a relative could act as the child's advocate. In the case of a native child, a member of a band council or native friendship centre might be a more appropriate advocate. If the child were admitted to residential care, a copy of the signed consent form would have to be kept in the child's file. It should be noted that such requirements will also be proposed for ensuring a valid consent to adoption and for the release of records.

Voluntary access to services

A person's consent is probably not informed if he does not fully understand what he is consenting to. Therefore, ***we are recommending***, that, where necessary, translation or interpretation services be made available to a child and his parents. This recommendation would ensure assistance to native people, ethnic minorities, and any other persons (e.g., the deaf) who require such a service.

B. Support services

It was suggested earlier that many changes to the children's services system could be brought about through non-legislative means. Nowhere is this as apparent as in the case of support services, where legislation would play a relatively minor role. Since it is here that the service system should be able to respond most flexibly to the needs of individuals, the support services part of the legislation would be brief and general. Rather than proposing rigid legislative rules, ***We are recommending*** that the development of support services be promoted by means of a broad definition and flexible funding provisions and eligibility criteria. However, the fact that few statutory provisions are required does not mean that these services are insignificant. On the contrary, the availability of a range of support services is crucial to the overall service system since these services are presumed to act as a first line of defence against family breakdown and the institutionalization of children. Furthermore, because of the stress placed throughout this paper on the use of less restrictive alternatives, it is important to highlight the category of support services as an essential component of the framework of the legislation.

The existence of a range of support services is basic to the Ministry's policy of promoting programs that strengthen and assist, rather than replace, the family. As stressed in the Declaration of Principles, services to children should support, enhance and supplement the family wherever possible. Though most families at some point require assistance, whether from friends, relatives, or social agencies, the needs of children are generally best met within their families.

We have already proposed that, with the exception of child-initiated counselling, the consent of the parents should suffice for the provision of all support services. What remains to be clarified is the meaning of support services and how service may be initiated.

Definition and types of services

The definition of support services should be broad and inclusive to cover the wide spectrum of needed service and family situations. In other words, it should reflect the fact that families and children may require support for a variety of reasons and in a variety of ways. As noted, a range of agencies may be involved in providing support services to meet the needs of individuals and groups such as handicapped or emotionally disturbed children and their families, single parents, pregnant teenagers, children in need of protection and their families, and some young offenders. The definition should clearly indicate that these services support and supplement the family rather than compete with it, and that services should be provided in response to people's needs and not to the requirements of service agencies. ***We are recommending*** that support services be defined as non-residential and short-term residential services that:

- help a family maintain their child at home or have the child reintegrated into the home;

- promote the physical, emotional or intellectual development of the child; or

- help the older child achieve independence or integration into the community.

This broad definition of services includes programs such as day care, homemakers, respite care, infant stimulation, some financial subsidies, aftercare services and child and family counselling, and allows for the development of programs which do not now exist. (See the section on "The flexible service system" for a detailed discussion of how the licensing and funding provisions would affect the development of new programs.)

In deciding how to define "short-term" residential services, a number of factors including a child's sense of time need to be taken into account. It is worth remembering that, to a child, a residential stay of even only a few weeks may seem like a long time. Another consideration is, of course, present practice: most short-term admissions of children take place for purposes of respite care or parent relief, assessment, or are emergency admissions. According to the 1978 residential services inventory, most children admitted for the above reasons stay in residential care for less than two months. ***We are recommending*** that a residential stay of six weeks or less be considered "short-term" and that anything longer than that accordingly be defined as "long-term". (The proposed provisions for long-term residential care will be described separately in a later section.)

Voluntary access to services

There are several reasons for distinguishing between short and long-term care in the legislation: short-term residential services are more involved in family support than is long-term care and they are, therefore, most appropriately included in the support services category. More important, however, long-term placement of a child is considered a serious form of intervention that requires greater procedural safeguards. Short-term care, on the other hand, does not entail the same risks to the child and should be more readily available to families. However, it is recognized that repeated short-term admissions may also have serious consequences for the child and family. We are thus considering proposals for limiting the number of times a child may be admitted for six-week periods in one year.

How service is initiated

Individual service agencies will continue to define their own admission criteria. However, service plans will be negotiated with agencies by the Ministry to help ensure that services are available and accessible to the people who need them. The eligibility criteria for these services should, therefore, be broad and flexible to allow agencies to respond to people who would benefit from service. They should also allow people to define their own service needs and initiate involvement for themselves or on behalf of a family member. ***We are recommending*** that a support service may be provided to all or part of a family unit and to individual children living independently, and that service may be initiated by a child, a parent or someone on their behalf, or by a service provider who may offer a service to a child or family.

C. Admission to long-term residential care

Introduction

At present, there are two ways for a child to be admitted to a residential facility: either with the consent of his parents or under a court order (as in the case of offenders and children in need of protection). This part of the legislation would cover the provision of residential services to the first group of children, those proposed for admission directly by their parents or by someone on behalf of the parents (e.g., a professional or agency). Generally included here would be most specialized residences for children with special needs (e.g., mental health and mental retardation facilities) and any other residences that will admit children with parental consent, as opposed to doing so under a court order, as well as parent-initiated foster care arrangements. As

mentioned previously, this legislative category would not create a new type of residential service different from existing ones or distinct from most of the residential services available to young offenders and children found to be in need of protection. Rather, the purpose of this part of the legislation would be to consolidate current residential service provisions for certain kinds of admissions and introduce new procedural safeguards. The provisions for care-by-agreement (to be renamed "voluntary care agreements") are discussed separately at the end of this section.

The risks to the child

Although legislation would generally play a relatively minor role in the voluntary stream, there is more need for legislative provisions in the area of residential services. It is recognized that, for many children, temporary admission to residential care may be both necessary and useful. Particularly in situations where non-residential services have failed to alleviate the child's and family's problems, residential placement may offer a beneficial alternative. Nevertheless, admission to residential care, especially long-term admission, is considered a serious decision with far-reaching consequences for the child. The following is a brief summary of what the literature describes as the "risks" to the child associated with long-term residential care. It should be stressed that these risks are present irrespective of the potential value of placement.

From a child's perspective, probably the most basic and immediate result of residential placement is the separation from his family, friends and community. Furthermore, regardless of whether the child is benefitting from the residential stay, he is likely to experience feelings of loss, abandonment, and resentment. Another consequence of prolonged residential placement is that children may later encounter re-integration problems, particularly in schooling, social relationships and, in the case of older children, employment. Clearly, the longer a child is in residential care, the harder re-integration becomes, not only for the child, but for the family as well. In fact, for many children, the length of time away from the family appears to be a major factor in determining whether he will ever return home. In the child welfare field, for example, it is well documented that the chances of re-uniting children with their natural parents are generally slim after eighteen months. More important, perhaps, it has been shown that children with a "history" of residential placements are more likely to be subsequently proposed for residential care. In other words, a first admission increases the likelihood that residential care will again be viewed as the most appropriate alternative for a particular child.

Voluntary access to services

It has been said that a feature that is probably unique to a residential service is that no other service form is apt to encompass or control as much of a person's life. While this is generally true of any residential service, it is particularly true of institutional facilities which, by definition, are set up to meet a wide variety of needs in the same location (i.e., on the same grounds). For example, large residential facilities for children which provide educational, recreational and medical services, in addition to residential care and treatment, are apt to exercise substantial control over a child's life and to segregate him from his community. Furthermore, most children in our society, especially school aged children, do not eat, sleep, play, go to school, and receive medical care and religious instruction in the same place. This suggests that institutions create, at best, an artificial environment and, at worst, a setting that segregates children from their peers in the community.

Another characteristic of institutions that may result in serious consequences for the child is their size. Regardless of how well-intentioned or well-staffed, certain dynamics inevitably occur in any large institution, such as regimentation, bureaucratization and loss of individualization. These characteristics are not unique to residential facilities for children but are common to adult institutions. However, while they may result only in inconvenience and frustration for a temporarily hospitalized adult, for example, the effects of institutionalization are more serious for children. Specifically, the emphasis on compliance, conformity and passivity likely to occur in institutions is especially harmful to children, who are at a stage when there is a particular need to develop a sense of initiative, self-respect, and self-confidence. Several writers have also identified a type of "institutional neurosis" characterized by apathy, resignation, submissiveness and loss of interest apparently common to people who have spent long periods of time in institutions. It should be pointed out that many institutions are making efforts to reduce these (e.g., setting up smaller units or "cottages"). However, these efforts have met with only limited success, given the larger institutional context.

Finally, in addition to the risks described above, a number of commentators have identified other possible harms specifically associated with admissions to mental health and mental retardation facilities. A major one is the stigma resulting from being labelled "mentally ill" or "mentally retarded". Apart from the effect of such a label on a child's self-image, it may have a detrimental impact on the child in later years. For example, it is argued that future, otherwise innocuous behaviour may be viewed with suspicion by teachers, neighbours, potential employers, the police, and other authorities.

Problems with current admission procedures

Children may, at present, be admitted to residential facilities with their parents' consent, the recommendation of a professional, and the willingness of the facility. In most cases, the facility will base its admission decision on a clinical assessment of whether the child needs the service. If the child is not considered appropriate for admission, he is usually referred to another residential or non-residential service.

While the existing procedures for parent-initiated admissions may, at first glance, appear perfectly reasonable and adequate, it should be remembered that other children (i.e., young offenders, children in need of protection) may be placed in a residential facility only following a court hearing that offers many procedural protections not provided to children admitted directly by their parents. One essential difference, of course, is that the first group is admitted with parental consent which, some argue, eliminates the need for procedural safeguards for the child. Nevertheless, many residential agencies have established procedures to reduce the likelihood of inappropriate admission. However, the legislation does not at present require such safeguards.

The existing admission procedures in Ontario, as described above, are typical of those throughout most of North America. Yet, it is worth noting that a number of jurisdictions have enacted legislation requiring greater procedural protections for children admitted by their parents to mental health and mental retardation facilities. These changes have occurred largely in response to several recent court cases and an increasing number of articles and commentaries dealing with the issue of the voluntary admission of minors.

The arguments in support of additional procedural safeguards for children admitted to residential care stem from two major concerns: the risks to the child entailed by institutionalization and the risk of erroneous commitment. It should be noted that, although the literature on this subject does not differentiate between institutionalization and admission to small group homes, for example, some of the arguments clearly apply more readily to the former. The "risks" to the child associated with residential placement have already been discussed. However, the arguments on the other side warrant equal attention. They focus primarily on the concern that some commentators seem to ignore the fact that many children may need and benefit from residential treatment. Therefore, while the risks of institutionalization should perhaps not be discounted, neither should the harms to the child that may result from not receiving needed treatment. It is argued that what is truly stigmatizing for a child is *not* the label, but rather the symptoms of an emotional or mental illness.

Finally, several writers have suggested that the erroneous decision not to admit a child may be as serious as the inappropriate or unnecessary admission of a child.

This last point raises the question of whether existing procedures adequately protect children from erroneous admission decisions. On the one hand, it is argued that, because present procedures are not sufficiently impartial, inappropriate and subjective admission decisions may frequently occur. Even parents may not always be objective in deciding to propose their child for residential admission. They may be too close to the child to be able to determine the precise nature of the problem or the need for residential treatment. More important perhaps, the parents may be frustrated, not only in trying to cope with a difficult child, but in seeking help from social agencies. As well, in some cases, the desire to admit a child may be a response to serious family problems in general, and not necessarily to the particular child's behaviour. It may also be that parents are unaware of alternatives to residential placement and perhaps are not encouraged to find other solutions. In fact, parents may feel coerced into seeking residential placement for the child, although coercion may not have been intended, in order to avoid court proceedings under The Child Welfare Act or the Juvenile Delinquents Act. In summary, it appears that the parents' decision to admit their child may result from a combination of factors, many of them unrelated to the child's needs or problems. It is important to stress that the above line of argument does not call into question the parents' motives or feelings for their child; rather, it suggests that, regardless of motives, the decision to admit a child to long-term care is so serious that it should be made only by a neutral and impartial fact-finder or, at least subject to review, in accordance with strict procedures and criteria. It should be noted that the above concerns would, of course, also apply to an agency such as a child and family service agency with guardianship authority over a child, which is proposing a child for admission to an institution rather than to a foster home or group home.

On the other side, it is argued that, unless a child is found to be neglected or abused, the traditional presumption that parents act in their child's best interests should apply to the admission decision. In other words, it is felt that state or other outside intervention can only be justified if the child is found to be in need of protection. The point is also made that there is no basic difference between the admission decision and other major parental decisions, such as consent to surgery. A further argument is that parents already have limited discretion to place their child in residential care. The final admission decision is usually made by the admissions committee of the facility

after an assessment of the child and consideration of other alternatives. It is argued that no one is better qualified to render judgments about the appropriateness of admission than professionals trained in assessment and diagnosis.

In response to this final point, a number of commentators have several reasons for doubting that professional opinion is always an effective check on inappropriate parental attempts to admit a child to residential care: it is felt that the professional may over-identify with the parents, since it is the parents who have come to seek help, whose situation seems most desperate, and who seem the most reliable source of information. Furthermore, as noted earlier, it has been pointed out that psychiatrists and other professionals are apt to err on the side of medical caution. In other words, there may be a tendency to over-diagnose certain problems (e.g. emotional disturbance) and to recommend residential treatment when in doubt. It is also significant that professionals may disagree among themselves over the diagnosis and the need for residential treatment for a particular child. The inexactness of psychiatry and other social sciences, such as psychology and social work, combined with the vagueness of terms like "mental illness" or even "mental retardation", may result in subjective decisions regarding the appropriateness of a particular child's admission to residential care. For example, according to the 1979 resident statistics for Schedule I and II mental retardation facilities, approximately 75 children were admitted for problems such as "conduct disturbance", "mental disorder", "nervous system diseases", and "borderline mental retardation". Assuming accurate diagnoses, one would have to question whether these children are most appropriately served in mental retardation institutions. The situation is similar for children admitted to mental health facilities. Between January 1, 1977, and March 31, 1978, 960 children under fourteen were admitted to mental health institutions in Ontario. 856 (89 per cent) of these were admitted with non-psychotic diagnoses, including 168 with "transient situational disorders of childhood". These figures suggest that some children are admitted to mental health facilities based on diagnoses that some would argue do not necessarily indicate the need for long-term residential treatment.

Another issue relevant to the discussion of the need for procedural safeguards is whether adequate attempts are made at present to secure less restrictive or drastic alternatives to residential placement. While it is true that many facilities, and indeed many families, will explore non-residential options before proposing a child for residential care, there is now no guarantee that this will happen since it is not required by law. More importantly, it may be unrealistic and unfair to expect parents and professionals to be aware of all alternatives to residential placement. Since families frequently seek residential

placement for their child during periods of crisis or stress, they may not be able to search for other alternatives at such times. A pre-admission review would assist families in making such a serious decision. Furthermore, both the child and the parents could be spared potentially unnecessary separation and disruption if other possibilities were thoroughly investigated prior to admission. Finally, even if the admitting facility did know of a more suitable program for a child, it could, in most cases, only make a referral. In other words, the residential facility would have little or no authority over another agency's admission decision. The result is that facilities sometimes admit children who would be better served by another residential or non-residential program simply because the admitting facility and the parents are unable to secure a more appropriate service.

Third party review

We feel that, on balance, the concerns raised above indicate that there is a need for some form of review of the decision to admit a child to long-term residential care. The challenge, of course, is to introduce a procedure which would effectively assist in decision-making and would protect the rights and interests of children and families, without needless interference in the parent-child relationship, the judgments of professionals, or the availability of residential services. It is also important that procedural safeguards for children not become obstacles to parents seeking help and not become process merely for the sake of process. Notwithstanding these concerns, certain elements can be identified as essential, regardless of the exact form such a review procedure might take.

We are recommending that a placement review function be created, with the following minimum requirements: an independent and impartial decision-maker or decision-making body (e.g., a "placement review body"); the authority to engage in neutral fact-finding, including an examination of less drastic or restrictive alternatives to residential placement; and an opportunity for the child and other interested parties to be heard. It should be noted that a review could take place at any point in the admission process. Several alternative proposals for third party review are presented below.

The meaning of "review"

The fear has been expressed that an external review by a "placement review body" (PRB) may become an adversarial and formal process that would pit parent against child and professional against professional. The consequences of such an encounter are, with some justi-

fication, presumed to be detrimental to all parties. To a large extent, however, formality and an adversarial atmosphere can be avoided by specifying what is meant by "review".

At one end of the continuum of possibilities is the "paper review" consisting of an examination of relevant documents such as case files, family histories, and professional reports. Such a review process could include an interview with the child and family but would probably not be extended to interviews with other interested parties. Paper reviews would probably not be as time-consuming as other types of reviews. Unfortunately, they are also likely to be less thorough. Particularly in judging the feasibility of other less restrictive alternatives, it may be necessary to talk to a number of people not directly involved in the case. A further drawback is the potential for becoming merely a "rubber stamp". Even the most knowledgeable and well-intentioned group of individuals is likely to become mechanical in its judgments if it does no more than read files.

At the other extreme is the hearing. The approach taken in a number of American jurisdictions is to require a pre-admission court hearing whenever a child is proposed for long-term admission. In some cases, the older child may waive his right to a hearing if he consents to the admission. Although court hearings would probably offer greater procedural protections than other forms of third-party reviews, they are also potentially more cumbersome, expensive and adversarial. A process involving a hearing by an administrative review body could also provide adequate procedural safeguards, while avoiding the problems inherent in court hearings. As well, it may not be necessary to have a pre-admission review in all cases.

It should be stressed that hearings may range from very formal proceedings that include the right to notice, cross-examination, and rules of evidence, to very informal situations where interested parties may be heard. For example, a review body may require such things as notice and a written statement of the grounds for admission, while still conducting the hearing in an informal way (e.g., without rules of evidence or the presence of lawyers). It would be possible either to hear everyone involved in a case together or one at a time. Alternatively, interested parties could speak to review body members privately or, if they wished, submit written statements. As mentioned earlier, the review body could also call on people who, it feels, should be heard or represented. The advantage of a hearing over a paper review is not its formality since, as noted, it could be very informal. Rather, a hearing offers a forum for open discussion, the consideration of differing views, and an opportunity for all concerned persons to be heard.

Another possibility would be an inquiry-like review that could include a review of the documentation, as well as interviews with selected persons, such as the child, his family, and agency representatives. Since the scope of the inquiry would depend on the informational needs of the review body, it might not be necessary to hear everyone. The traditional case conference approach would also be an option. Similar in some ways to both the "paper review" and the inquiry, a case conference would consist of a meeting of the individuals with a professional interest in the case. Decision-making would be by consensus.

A final possibility would be to allow the review body to decide on a case-by-case basis what sort of a review to conduct. For example, it might be decided that a post-admission paper review was sufficient for those children admitted to residential care following a pre-admission hearing. On the other hand, for the sake of province-wide fairness and consistency, it might be necessary to specify the circumstances requiring a hearing, while permitting the review body to exercise its discretion in all other situations.

We are recommending that the legislation specify when an informal hearing must be held, at which all interested parties are given the opportunity to be heard. Unless the law specifically were to call for a "hearing", the review body could conduct the review in whatever manner it felt is appropriate for the particular case, including any of the ways described above.

Circumstances warranting a hearing

Just as there is a variety of forms a review or hearing can take, so is there a range of possible situations warranting review. One obvious option would be to require a hearing for all children entering long-term residential care via the voluntary route. This would mean that there would be a hearing regardless of the type of facility and whether or not the child consented to the admission. In this way, the seriousness of long- term placement would be recognized, since the same procedural protections would be offered to all children proposed for admission. On the other hand, by treating all residential admissions as equally serious, this approach might necessitate hearings in situations where they were probably not essential. From an implementation point of view alone, it may be unrealistic to require hearings for all long-term residential placements. For example, between September, 1980, and August, 1981, there were more than 5,000 admissions to long-term residential care with parental consent, including care by agreement.

Assuming that it would not be possible to review each admission there are several ways to limit the number of hearings. One would be to require a hearing only if a child were proposed for admission to an institution (to be defined). This approach would not only reflect the greater seriousness of institutional placements, but it would also indirectly encourage parents and professionals to explore less restrictive residential alternatives prior to considering institutionalization. An obvious drawback is that children admitted to non-institutional facilities would not receive the same protection from unnecessary or inappropriate placement. However, it should be remembered that the need for procedural safeguards is proportional to the seriousness of the consequences of a decision. Therefore, if, as argued earlier, admission to an institution is a more serious matter than, for example, group home placement, one could justify requiring hearings only for admissions to institutions. For example, the placement of a young mentally retarded child in an institution where the average length of stay is more than three years probably warrants greater concern than an adolescent's admission to a group home.

Another way to limit the number of hearings would be to require a hearing only if the older child did not consent to the admission, regardless of the type of facility. This would recognize the seriousness of the child's refusal to consent, while leaving the final decision in the hands of an impartial decision-maker. In some ways, this option is similar to allowing the child to waive his right to a hearing. One of the problems with both these approaches is that they seem to assume that a child's consent obviates the need for an independent review to determine the appropriateness of residential placement. A child who consents to admission or waives his right to a hearing would not receive the benefits of an impartial review process where the feasibility of less restrictive alternatives would be examined.

Another criticism of this approach is related to the problem of singling out the child's refusal to consent as the only ground for a third party review. While the child's consent or lack thereof should, undoubtedly, be a consideration in the hearing process, it is questionable whether it should constitute the sole or most important factor in determining when to require a hearing. For instance, the decision to admit a child of any age to an institution is probably more serious than the decision to admit an older child to a group home against his will. Furthermore, there are reasons to believe that procedural protections may be more important in the case of younger children, since the harmful impact of long-term residential care may fall more heavily on very young children.

Another option would be to require hearings whenever young children (e.g. six years and under) were proposed for long-term admission. Not only is prolonged residential care more likely to harm young children, but it also appears that the risk of erroneous diagnosis is greater in the early years or months of a child's life. It was suggested earlier that a first admission increases the likelihood that a child will subsequently be proposed for admission to residential care. Interestingly, a 1979 pilot study of the Child Advocacy Information System (the "tracking system") discovered a direct relationship between age of the child and months between placements in certain residential settings. Younger children tended to have experienced more frequent re-admission to the residential services system than did older children. This disturbing trend should itself justify requiring a careful and impartial review whenever young children are proposed for long-term residential admission. It should be noted that approximately one-third of the admissions to long-term care were of children six years of age and under.

It can be seen from the above that there may be a variety of situations warranting a hearing. Ideally, every proposal for long-term admission should probably be reviewed. Since this may not be practicable, mandatory hearings might need to be limited to those situations with potentially the most serious consequences. Therefore, ***we are recommending*** that informal pre-admission hearings be required:

- for all admissions to institutions;

- for all admissions of children six years of age and under;

- whenever the child twelve years of age and over does not consent to admission.

It should be noted that the above provisions would not apply to short-term admissions. However, if a child were subsequently proposed for long-term care (i.e. while in short-term care or afterwards), the provisions for long-term residential care would apply. In other words, the short-term admission route may not be used to circumvent the procedures for long- term admissions. (Voluntary care-by-agreement will be dealt with separately in a later section.)

The term "institution" will have to be specifically defined for the purpose of the legislation. Possibly, a schedule will list the facilities which would be subject to the provisions pertaining to institutional facilities, such as Schedule I and II mental retardation facilities and certain children's mental health centres. The two factors that should probably be considered in designating a facility as an institution are

its size and degree of self-containment. A "self-contained" facility is one where the children have most of their needs met within the residence or on the grounds of a residential complex (e.g., a residential school).

We are recommending that an "institution" be defined as a self-contained facility in which ten or more children live. The choice of a numerical cut-off point is obviously arbitrary; however, ten seems like a reasonable number since, the larger the residence, the more likely it is to become self-contained, segregating, and to exert substantial control over the lives of its residents. Furthermore, a precedent exists in Saskatchewan's Family Services Act, which defines as an institution any residential facility with more than ten children. We recognize that any definition of "institution" is open to debate and we would welcome comments and suggestions.

An alternative proposal would be to allow the placement of a child for up to six weeks and require PRB approval if an extension is sought. If the child twelve and over consented to remaining in care, PRB approval would not be needed. One advantage of this approach is that it would eliminate the need to draw distinctions based on the child's age and type of facility. Another PRB review could be required at the end of six months if the parents applied for an extension of the placement.

Post-admission reviews

There would be little point in scrutinizing the appropriateness of the proposed service prior to admission without also monitoring the success of and the continued need for residential care. For children admitted to long-term care without the procedural protections afforded by a pre-admission hearing, the need for reviews at various points after admission is even greater. Requiring post-admission reviews is consistent with the present review provisions for Crown wards in the child welfare and training schools systems and with the internal review requirement in the standards for residential care (now regulations under The Children's Residential Services Act).

At present, the regulations under The Children's Residential Services Act call for periodic internal reviews of children in residential care. Specifically, facilities are required to conduct an informal internal review of the child in relation to the plan of care at least every thirty days during the first six months and once every six months thereafter. One option would be to require only *internal* reviews, in accordance with the above-mentioned regulations (which will be incorporated into the new legislation). One problem with this approach is that it does

not include an *external* (to the agency) review requirement. It could be argued that there is the same need for an independent and impartial external review after admission as there is prior to admission.

Another possibility, then, would be to require a regional Ministry official, such as an area manager or program supervisor, to conduct external reviews. An obvious drawback would be the potential for either an actual conflict of interests or, at least, the appearance of such a conflict, since the Ministry also funds most residential programs. It would be better to have the review conducted by someone who is not only external to the agency, but to the Ministry as well. Since the placement review body would already be experienced in conducting pre-admission hearings, it would be desirable to also have this group involved in post-admission reviews.

We are recommending that the placement review body be required to conduct a review,within one year of admission and every year thereafter, of all children admitted to residential care on the consent of their parents. In some ways, this would be similar to the care-by-agreement arrangement whereby a child may be admitted to residential care for up to a year. Unlike care-by-agreement, however, a child admitted on the consent of his parents would be allowed to remain longer than a year if the placement review body determined that there was a continued need for residential care. The post-admission review provision would, of course, not apply to children admitted under care-by-agreement.

Even though we have recommended that all children be reviewed, we realize there are other possibilities. For example, the review body could be allowed to select the cases it wanted to review. This could be done either at random, on a "spot check" basis, or in accordance with certain criteria or priorities. The major advantage is that it would limit the number of external post-admission reviews. However, while this approach might act as a check on the residential agency, it would not adequately protect individual children from inappropriate or unnecessarily prolonged stays.

Criteria for voluntary admission and continuation of residential care

To ensure that children are protected from needless or inappropriate residential placements, clear criteria should exist to guide the discretion of the decision-maker. Regardless of whether the decision to admit a child was made by the facility or an independent placement review body, a child should be admitted only if the need for residential care or treatment has been shown. Basic to such a decision would be the determination of whether the child, in fact, has "special needs"

and, if so, whether residential care or treatment would most appropriately meet these needs. Even if residential placement is judged to be the best way to serve the child, the type of residential care or treatment should be the least drastic or restrictive feasible under the circumstances. For example, a foster home or group home should be considered to be less restrictive than an institution. Likewise, providing a non-residential service would be a less drastic way of meeting a child's needs than residential placement. (For a definition of "least restrictive alternative", see p. 7 of the Declaration of principles). Finally, the admission criteria should require an assessment of the appropriateness and desirability of placement in the specific facility to which a child's admission is being sought.

We are recommending that the decision to admit a child to long-term residential care be based on the following criteria:

- the child has a special need (e.g., mental disorder, emotional disturbance, developmental handicap, etc.);

- the specific program proposed for this child is available at the facility and there are reasonable grounds to believe that the program will benefit him;

- no less restrictive alternative is feasible.

Similarly, there is a need for criteria on which to decide whether a child should continue in residential care. ***We are recommending*** that the decision to allow a child to remain in a specific residential program be based on the following criteria:

- the child has a special need;

- the child is benefitting from the program offered at the facility;

- no less restrictive alternative is feasible.

In addition to the above criteria, another important consideration is the child's need for continuity of care. Unless the child is returning to his family, moves or transfers should generally be avoided. On the other hand, in situations where the child is clearly not benefitting from a program and a more appropriate placement is available, continuity of care may have to be sacrificed for programmatic gains. The decision to allow a child to remain in a specific setting must attempt to balance potentially competing factors. At the least, however, ***we are recommending*** that the child's need for continuity of care be a consideration in all transfer decisions.

Voluntary access to services

It should again be noted that the above admission criteria would not apply to short-term residential stays, including short-term placement under care-by-agreement. Instead, the criteria of the admitting facility would, as now, have to be met.

Powers of the placement review body

As mentioned, the placement review body (PRB) would have the authority to make decisions regarding a child's admission, discharge, or transfer. Particularly in situations where the PRB decides that a child should not be admitted to residential care because a less restrictive alternative would be more suitable, it might be necessary to support the family in keeping the child at home.

Therefore, ***we are recommending*** that a PRB be granted the authority to order the provision of a non-residential service under certain circumstances. Specifically, if the PRB judged that a non-residential service would be more appropriate and less restrictive for a particular child, it could order that the service be offered to the family. It is assumed that an appropriate non-residential service is preferable to residential placement in most cases and that a child should not be admitted to residential care merely because other alternatives are neither accessible nor available to the child or family.

The exercise of this authority has tremendous potential for supporting families by offering the help needed to keep their child at home. If, as suggested earlier, the parents pursued residential placement at a time of stress or crisis and did not explore other alternatives first, the provision of a non-residential support service would likely be welcomed. However, the parents would be under no obligation to accept the offer of such a service.

The fear has been expressed that the PRB's authority to order non-residential services may create a system so open-ended as to make the anticipation and control of costs extremely difficult. On the other hand, it could be argued that, at the very least, a family should have the opportunity to receive a support service that was no more costly than the residential program that would otherwise be provided. Therefore, ***we are recommending*** that the PRB's discretion to order a non-residential service be restricted in two ways: by limiting the amount that may be spent on a non-residential service and by requiring that the child would otherwise be eligible for long-term residential placement. In other words, the cost of the non-residential service should not exceed the cost of the proposed residential program and the judgment must have been made that, without the provision of the

non-residential service, the child would be admitted to long-term residential care. Further work is being done on specifying these restrictions that will be incorporated in the regulations to the Act.

In addition to the authority described above, certain other powers would be needed for the proper performance of the placement review function, including access to relevant information and the authority to conduct interviews and solicit outside opinions.

Finally, ***we are recommending*** that the parents and the child twelve or older be able to appeal the PRB's decision to the Ministry.

Selection and composition of the placement review body

It has already been stressed that the independence and impartiality of the review body would be important features of the placement review function. Clearly, the PRB's capacity for neutral fact-finding and credible decision-making would depend largely on its composition and on the selection process. Equally important is the PRB's ability to act quickly so as to avoid lengthy or unnecessary delays. This suggests that the review body should consist of a small group of readily available people.

From a speed and availability point of view, it would probably be best to have a single individual act as the PRB for each case. On the other hand, a group of perhaps three people would more likely contribute to impartiality and a balanced perspective. Either way, it might be desirable to adopt the Children's Services Review Board approach and to have available a province-wide pool of people from which a small number of PRB members is drawn for each review. The native members of this pool could be nominated by local Band councils or other native organizations.

There are several options in considering the composition of the PRB: for a three-member PRB, it might be desirable to have an expert in residential care, a representative from the community, and an expert in family support or non-residential treatment. Another possibility would be to require the participation of at least one "consumer" or parent of a child with special needs. No matter which approach is adopted, the PRB could also include associate members or consultants, such as lawyers, psychiatrists, and other professionals who could make their expertise available on request. In areas of the province with a large native population, it would also be important to have representative native groups involved in specifying the composition of the PRB. As well, it has been suggested that the PRB should

include one person specifically to speak from the child's perspective. However, this may not be necessary since the Ministry is now exploring ways of ensuring advocacy for children and their parents in a variety of situations.

Finally, there are several possibilities regarding the auspices under which a PRB would operate. One option would be to adopt the present Training Schools Advisory Board (TSAB) model and have the Minister appoint the members of a PRB. Unlike the TSAB, however, PRBs would probably be local bodies and should thus perhaps be composed of people from those areas.

We are recommending that a pool of people be created from which the PRB would assign one or more persons to a review.

Voluntary care agreements

Under the present Child Welfare Act, parents may voluntarily place their child into the care and custody of a children's aid society for up to a year. The care-by-agreement arrangement is designed for situations "where a parent through circumstances of a temporary nature is unable to make adequate provision for his or her child...." Last year, more than half of the 5000 admissions to long-term care, with parental consent, were under care-by-agreement. In many respects, the placement of a child under care-by-agreement is like other voluntary placements since a child may be admitted to residential care only if the parents consent. However, unlike most other placements, in the case of care-by-agreement, the parents may be involved in child protection proceedings if they do not consent. Present legislation merely states that parents may enter into a care-by-agreement arrangement "subject to the approval of the society", but offers no direction as to when it is the most appropriate approach. To ensure consistency, there appears to be a need to introduce clear criteria and procedural safeguards for both the parents and child, similar to the earlier proposals for other long-term admissions.

One way of increasing the likelihood that residential placement is necessary would be to require the "child in need of protection" criteria (see pp. 62-63) to be met before entering into care-by-agreement (hereafter referred to as "voluntary care agreement"). In this way, there would be some guarantee that the situation was indeed, serious enough to warrant removal of the child. On the other hand, it could be argued that voluntary care agreements should be available as a preventive strategy, long before the child is actually in need of protection.

Furthermore, if voluntary care were restricted to situations where the child is already endangered, the parents might feel threatened by the possibility of child protection proceedings. Finally, it should be remembered that residential placement is only one disposition available to judges in child protection cases, since the court could order that the child remain at home, subject to agency supervision or the provision of a support service. Therefore, the fact that a child is in need of protection is not a sufficient reason for removing him from his family and placing him in residential care.

Rather than limiting voluntary care agreements to situations where the child is already in need of protection, it would be preferable to determine whether residential placement is the best way of meeting the child's and parents' needs. Since parents seek placement at a time of crisis, they are generally unable to explore other alternatives. Furthermore, many people are unaware of the availability of non-residential support services. Nevertheless, avoiding residential placement would spare both the parents and the child the trauma of separation. It should be remembered that, in addition to the legislative proposals that follow, the Ministry has already introduced several changes to shift the emphasis from removing children to helping them in their own homes. A good example is the new funding formula which encourages the use of non-residential services over residential placement.

We are recommending that prior to accepting a child for long-term placement under a voluntary care agreement, the child and family service agency be required to conduct a pre-placement inquiry to determine whether:

(a) the child is likely to be in need of protection if not temporarily placed;

(b) there are less restrictive alternatives to residential placement; and

(c) an adequate placement is, in fact, available for the child and would likely benefit him.

It should be recalled that these provisions would apply only to placements of more than six weeks. As well, as proposed earlier, the consent of the child twelve and older would also have to be obtained. If the child did not consent or if any of the other conditions warranting a pre-admission review existed (i.e. the child is six or under; admission is sought to an institution), then there would have to be a pre-admission hearing by the PRB.

Voluntary access to services

In order to ensure that the parents' consent were voluntary and that they were aware of the respective rights and obligations of each party, ***we are recommending*** that, when a child is accepted for placement under a voluntary care agreement, a written agreement with the following provisions be required:

(a) a statement by the parents and the child twelve and over that the placement is completely voluntary and that they have been informed of the opportunity to receive independent legal advice;

(b) a statement by the parents that they have discussed the need for placement, and alternatives to placement, with the agency worker and have concluded that they cannot care for their child at home;

(c) a statement that child protection proceedings will be considered if the parents refuse to maintain contact or perform other parental roles while the child is in care or if they are unable to resume custody or make other arrangements for the child's care at the end of a year.

As well, the agreement would continue to contain the following provisions: a description of the services to be provided to the parents to enable them to resume custody of the child and a description of the ways in which the parents will maintain contact with the child and participate in the child's plan of care. It should perhaps also specify that the agency must notify the parents or the staff person who will work with them or their child.

Under certain circumstances (e.g., if parents have been imprisoned or institutionalized), it may be impossible for the parent to maintain contact with the child. The special services agreement negotiated between parents of developmentally handicapped children and residential facilities at present allow the parents to designate another person to play the parental role (e.g., visiting the child, participation in the plan of care) if the parents are unable to do so. This approach could be applied to all placements of children in residential care, including those under voluntary care agreements. Therefore, ***we are recommending*** that the parents be permitted to designate another person to perform the parental role if they are unable to do so. The agency should be advised in writing of this designation, the period of time for which it will be in effect, and the reasons which require it. It should be noted that, as now, the maximum time period for a voluntary care agreement would be one year.

At present, parents are required to give notice if they wish to resume custody of their child. The legislation specifies that the child must be returned as soon as possible, but no later than 21 days.

However, several commentators have suggested that 48 hours would be a more reasonable period of time, especially in view of the fact that the parents have consented to the placement in the first place. Even though many children are returned sooner, we are concerned that 21 days may be an unnecessarily long time for both children and parents who, for whatever reasons, have to wait three weeks to be re-united. We would welcome your suggestions regarding this issue.

Finally, as noted, ***we are recommending*** that child protection proceedings be considered whenever parents refuse to state their intention to maintain contact with their child or perform any other parental function, although able to do so. This provision would emphasize the seriousness of a situation that would appear to be more than "temporary" care. If parents refuse to commit themselves to maintaining contact with their child, the terms of a temporary, voluntary care agreement would not be met. Furthermore, such a provision would help to protect children from the uncertainty of not knowing whether their parents intended to resume custody or whether they had been abandoned to the residential care system. If the parents state at the outset that they will not maintain contact, it would probably be better for the child to have child protection proceedings begin immediately, rather than at the end of the year, since a permanent plan could be developed as soon as the child enters care.

Parental involvement with children in long-term residential care

It is being recognized that one cannot over-estimate the importance both of the parents' role as partners in the residential placement process and of their continued contact with the child while he is in care. Ongoing parental attention and contact are seen as crucial to the implementation of the child's plan of care and in helping to reunite the child with his family. However, even though parents are now generally encouraged to be involved with their children after placement, there will probably continue to be some children who have little or no contact with their parents. Regardless of the reasons for the lack of parental involvement, these children would, in effect, be abandoned by their parents. However, even in cases where there is some contact between parents and child, parental involvement may be so minimal that the child is, for all intents and purposes, without a parent or guardian. In addition to the emotional impact on the child, such situations pose some difficult legal questions, particularly in the area of consent. The purpose of this section of the paper is to identify those situations in which lack of parental involvement may be an issue and to propose some possible solutions. The proposals would be restricted to children in long-term residential care.

Voluntary access to services

It should be stressed that legislation can play only a limited role in solving the problems resulting from parental uninvolvement. As in so many other areas, the most effective solution may be found outside the bounds of legislation. At one time, parents were discouraged from active involvement with their child since no contact was believed to be better for both the child's and family's adjustment to the new situation. In contrast, as mentioned, it is now the policy and practice of most facilities to encourage parental involvement. The previously mentioned special services agreements serve as an example. Among other things, these agreements allow parents to indicate the extent to which they wish to become involved in their child's program and to designate an interested person to assist in carrying out certain parental functions if the parents are unwilling or unable to do so. In fact, in several cases, the special services agreements have begun to involve parents who had been out of their children's lives for many years.

There are four major areas where lack of parental involvement may have particularly serious consequences for a child in long-term residential care: social and emotional support; consent to medical treatment and social services; transfer and discharge decisions; and participation in the plan of care. The first of these, social and emotional support, is probably the least amenable to legislative solutions, even though it may be the most troubling for a child. At admission, parents should be asked to name a person who would be willing to visit or offer emotional support to the child, if they themselves are unable to do so. If the parents neither visit the child nor designate another person, the facility could recruit a volunteer who would be prepared to play this role. The involvement of a person designated by the family or the facility would not require any special legislative provisions, nor would it necessarily affect the exercise of parental rights in other areas. If the parents changed their minds at some point and wished to be involved with their child, their participation should be welcomed.

A placement agreement between the parents and the residential facility, similar to that proposed above for voluntary care agreements, would help encourage parental involvement, as well as clarify the respective roles and responsibilities. Such an approach would build upon the existing special services agreement, which specifies the responsibilities of both the residence and the parents, as well as containing provisions regarding access to records, treatment, and consent. ***We are recommending*** that when a child is accepted for admission to long-term residential care, a written agreement be required with the following provisions:

(a) a statement by the parents and the child twelve and older that the placement is completely voluntary;

(b) a statement by the parents that they have discussed the need for placement and alternatives to placement with an agency or facility worker and have concluded that they cannot care for the child at home;

(c) a description of the ways in which the parents will maintain contact with the child and participate in the child's plan of care (if the parents were unable to perform the parental role, they should be asked to designate another person);

(d) a description of any services the facility would arrange or provide to the parents while the child was in residential care and afterwards;

(e) notification of the primary contact person for the parents.

Consent to medical treatment and social services

A number of residential facilities have indicated that a primary concern is determining who may consent to medical treatment and other needed services if the parents are unwilling or unable to make such decisions. Clearly, the absence of parental involvement creates more difficulty for certain kinds of decisions than for others. For example, in emergency situations, where the child's life is at risk, doctors may administer necessary medical treatment without parental consent. However, parental consent would be required for all non-emergency medical procedures and all social services.

Two situations may give rise to problems of consent: the facility's inability to locate the parents or the parents' refusal to consent to needed, non-emergency medical treatment or social services. If the parents cannot be found after all reasonable efforts have been made to locate them, it could be argued that the child has been abandoned and could be considered in need of protection. Therefore, ***we are recommending*** that where the parents cannot be found, the facility have an obligation to contact a child and family service agency, who would have to consider child protection proceedings. It should be noted that this recommendation fits within the more general proposals regarding reporting laws (see Chapter 4).

It has also been suggested that, under certain circumstances, the facility should be granted the authority to consent to the medical treatment of a child in its care. However, while this approach may be expedient and efficient, it also suffers from serious drawbacks. Most

important, it could be argued that the potential for a serious conflict of interest would be created by allowing a facility administrator to make important medical and other decisions on behalf of residents.

The parents' refusal to consent to medical treatment or social services for their child may also pose problems. Where needed non-emergency treatment is involved, the child could be found to be in need of protection only if withholding treatment would result in serious physical harm to the child. Some would argue that this is an overly restrictive provision since treatment or services may be needed for other than serious or life-threatening situations (e.g. dental treatment, psychological assessment). On the other hand, it could be argued that for less serious, elective treatment, the parents should have the right, as they do when the child is living at home, to refuse to consent to medical care or social services. To interfere with parental rights because of a relatively minor matter could be construed to be an overreaction. The reason for having a restrictive test for finding a child to be in need of protection is to respect family autonomy by reserving state involvement for situations where the child is, in fact, in serious danger. Therefore, ***we are recommending*** that the parents' right to refuse medical treatment or social services for their child be respected unless the absence of treatment would result in the child being in need of protection (as defined later). It would, however, be reasonable to ask the parents to consent to the basic program as a condition of admission.

Transfer and discharge decisions

In general, unless parental rights have been terminated, the consent of the parents is required at present before a child may be discharged or transferred to another residential program. As in the case of consent to treatment, problems may arise when the parents are uninvolved, disinterested, or totally absent from the child's life. In addition, the parents' refusal to consent to discharge and transfer decisions may result in a serious conflict between the parents and the facility. Even though we have not proposed special legislative provisions regarding the parents' refusal to consent to medical treatment or social services (unless the child is apparently in need of protection), there is a need to consider separately the situation of the parents' refusal to consent to discharge or transfer to another residence.

It is important to try to understand why parents would refuse to consent to having their child leave a residential facility. For example, if the child were proposed for transfer from an institution to a community residence, the parents might fear there would not be the same guarantee of security and protection for the child. In such situations,

it should be both the institution's and the community residence's responsibility to attempt to allay the parents' fears by inviting them to visit the proposed residence prior to the transfer and to discuss their concerns with the staff. Similarly, if the child were proposed for discharge, the facility should have a responsibility to ensure that the family received the support it needs to care for the child at home. If, after having discussed the implications of discharge with the facility, the parents still refused to consent to their child's discharge or transfer, the matter should be resolved by a third party. ***We are recommending*** that the parents, the child twelve and older, or the facility could bring the matter to the placement review body for resolution, if all reasonable efforts had been made to come to an agreement as to whether a child should be discharged or transferred. The PRB would have the same authority, described earlier, to order that support services be made available to a family if the provision of such services would eliminate the need for continuing residential care. If the PRB judged that the child should continue to be served in the facility, the child would remain where he was until the parents consented to a transfer or discharge or until a subsequent review determined that the child should be discharged. On the other hand, if the PRB decided that the child should be discharged, but the parents refused to consent to take the child home or to receive a support service, the facility would have a responsibility to find another appropriate residential placement. If all reasonable efforts had been made to come to an agreement with the parents, who still would not consent to the transfer and who refused to take the child home, the child might be in need of protection. ***We are recommending*** that child protection proceedings should at least be given consideration under such circumstances.

It should be stressed that the above provisions are not designed to force parents either to take their child home or to have him transferred to a residence to which the parents object, if such a move were clearly not in the child's best interest. However, many children might be destined to spend a substantial part of their childhood years in residential care if the parents refused to accept support services to enable them to care for the child at home or if non-residential support services were not adequate assistance for the parents. In such situations, it could be argued that the child was, in a sense, in the care of the state and that the responsibility for him should be shared by the parents and the state. Consequently, decision-making as to where the child should live should also be shared. Therefore, it would seem reasonable to refer the matter to an impartial third party if the parents and the facility could not agree on the desirability of discharge or transfer. This provision would, of course, not affect the parents' right to remove their child from a residence at any time. The subject of the disagreement between the parents and the facility would have to be

the parents' refusal to consent to discharge or transfer. As now, a residence could not keep a child against his parents' will unless parental rights had been terminated or limited by a court order.

Involvement in child's plan of care

Under the regulations to The Children's Residential Services Act, which would be incorporated into the comprehensive legislation, residential facilities are required to develop a plan of care within thirty days of a child's admission. Included must be a statement of the ways in which the parents will participate in the plan of care. The hope, of course, is that parents will make sure the plan is being carried out and will generally act as the child's advocate while he is in residential care. More important, every child should have someone outside the facility acting as parent or guardian. As mentioned, when parents participate as partners in the residential care process, the child's progress and reunion with the family are more actively promoted.

We have already recommended that if the parents indicated at admission that they did not wish to be involved in their child's plan of care, they should be asked to name another person who could take on this role. In the event that the parents refused to designate an interested person and were themselves unwilling or unable to assume certain parental responsibilities, ***we are recommending*** that the placement review body be given the authority to appoint an interested person to perform an active role as substitute parent or guardian. This role would include duties such as attending case conferences, receiving information on the child's progress, and generally ensuring that the plan of care was not only being followed, but also that it was appropriate to the child's needs. A variety of persons could assume these responsibilities, including parents of other children in care, friends or relatives of the child, and members of associations for the mentally retarded and similar voluntary associations.

We are also recommending that where future parental uninvolvement is identified at admission, the facility would have a duty to contact the placement review body, which would be required to conduct a review within six months of admission. It was proposed earlier that all children in long-term residential care be reviewed within a year of admission. However, it is felt that the situation of children with uninvolved parents warrants greater external scrutiny. Thus, we are proposing that there be more frequent external reviews for these children, in addition to the appointment of a person to assume the parental role.

A final problem arises when parents agree at admission to be involved in their child's plan of care and then do not meet the terms of the agreement (e.g., do not attend case conferences, do not consent to assessments or special services). The facility should have a responsibility to contact the parents and encourage them to participate or to designate another person. If this failed, ***we are recommending*** that the facility have a duty to contact the placement review body, which could appoint an interested person to assume the parental role or could schedule more frequent reviews of the child's progress.

In conclusion, it should be stressed that the above provisions would also apply to the situation of a child and family service agency with guardianship authority over a child. This means that the agency would be expected to play the parental role under the proposed legislative scheme.

D. If service is denied

From an agency's perspective, there are frequently good reasons for not accepting all children or families as clients. It may be that there is a long waiting list, or that service is clearly not appropriate, or the problems posed by a prospective client are too difficult or diverse. In most cases, agencies refer people to another program if they are unable or unwilling to provide the service themselves. Nevertheless, this experience can be frustrating and disheartening for families, especially if the reasons for being rejected are unclear or if there are repeated referrals from one agency to another.

It was stressed in the Declaration of principles that the offer to help should be based on the family's problems, and not, as is sometimes the case, on the structures and requirements of service agencies and institutions. Furthermore, it has been said that the test of a service system's strength is the ability and willingness of service agencies to serve "difficult" or "hard-to-serve" children and families. It could be argued, therefore, that regardless of the reasons for a particular child's or family's lack of success in obtaining a service, special efforts should be made to address the needs of individuals considered to be hard-to-serve.

We are recommending that a hard-to-serve process or mechanism continue to be available in all areas of the province to assist children and families in obtaining an appropriate service. The existence of

such a process at the local level assists a family, that has been unsuccessful in securing a needed support or residential service, to obtain the service. Such a mechanism has been set up outside the bounds of legislation through the use of case managers, computerized information systems (e.g., the tracking system), and informal negotiations between service agencies. However, to help the family to gain access to the appropriate channel and to highlight the importance of the concept, the existence of a hard-to-serve process should probably be established in law.

As now, the form of the mechanism or process could vary from area to area, but it would entail at the very least a person or committee with certain responsibilities. These might include, for example, ensuring the availability of clinical assessment procedures and the assignment of case managers, bringing together inter-agency teams to address a specific problem, negotiating a suitable service with an agency, and recommending to the Ministry the addition of funds to assist an agency to serve a particular child or family. In general, a case would probably only come before the hard-to-serve committee when no alternative resources were available or when the available resources were not, for whatever reasons, being used to meet the needs of a child or family. In some areas of the province, it might be desirable to establish a special hard-to-serve process for native children and families.

A related function of the hard-to-serve committee could be to monitor and document the cases referred to it each year. This information could serve as an indicator of the need for particular types of services in an area. For example, it could be used to forecast demand and service availability and, ultimately, result in the establishment of routine responses to frequently occurring service problems.

4.

Children in need of protection

Children in need of protection

In Voluntary Access to Services described earlier, child protection agencies (i.e., child and family service agencies) would continue to play a vital and active role in the provision of voluntary family support services. However, there would also continue to be a need for them to play the extremely difficult but absolutely essential role of intervening on an involuntary basis to protect children who cannot protect themselves from abuse and neglect. The focus of this chapter is on the involuntary aspect of child welfare services, currently covered by Part II of The Child Welfare Act.

As noted in the Introduction, the recommendations in this paper build on the interim legislative amendments of 1978. The most extensive interim amendments were made to The Child Welfare Act and, accordingly, the proposals in this chapter are fairly limited in that, primarily, they address areas not covered by the 1978 amendments. In order to clarify the broader context within which the recommendations are made, it may be useful to summarize some of the more significant 1978 amendments of Part II of The Child Welfare Act:

Best interest definition
Section 1(b)(i) defines the "best interests of the child" by specifying various factors to be considered by the court in determining what order would be in the best interests of the child. Included are such factors as the merits of the plan proposed by the agency as compared with the plan, if any, proposed by the parents; the child's mental, emotional and physical stages of development; and the views and preferences of the child if such views can reasonably be ascertained.

Third party applications
Section 22(2) permits a person concerned that a child may be in need of protection to apply to the court for an order directing the children's aid society to intervene on the child's behalf. The applicant must satisfy the court (a) that his reasons for believing that the child is in need of protection are reasonable and probable; (b) that the matter has been reported to the CAS; and (c) that the agency has either refused or failed within a reasonable time to take action on the child's behalf.

Temporary care agreements
Section 25(1) allows the agency to take a child into care under an agreement rather than by court process when circumstances of a temporary nature prevent the parents from being able to care adequately for their child. The initial agreement is restricted to a maximum of six months and can be extended to a maximum of twelve months.

Special needs agreements
Section 25(4) permits a parent of a child with special needs to place

the child voluntarily in care and custody or under the supervision of the agency or the Crown if he is unable to provide the services required by the child's special needs. Special needs are defined by regulation to include those resulting from any physical, mental, emotional, behavioural or other handicap.

Consent of the older child
If the child for whom one of the above agreements is contemplated is twelve or more years of age, he must give his written consent unless he is developmentally handicapped to such a degree that he is incapable of giving his consent.

Agreements for sixteen and seventeen year-olds
Section 25(11) allows a CAS to contract directly with a person between the ages of sixteen and eighteen for the provision of services to him.

Assessment
In order to assist the court in making a disposition that is in the child's best interests, section 29 permits the court, once it has found a need for protection, to order the child, any parent or other person in whose charge the child has been or may be (except a foster parent) to attend for medical, emotional, developmental or social assessment before a person specified in the order.

Terms and conditions attached to supervision orders
Section 30(4) permits the court that has ordered the child returned to his parents or placed with some other person subject to supervision by the agency, to impose reasonable terms and conditions relating to the method of supervision of the child on (a) the person with whom the child has been placed or returned, (b) the supervising agency and (c) the child.

Presence of child at hearing
Section 33 requires the court to presume that the child over the age of ten is entitled to be present at the hearing, unless the court is satisfied the hearing would be injurious to the child's emotional health.

Administrative review of crown wardship
Section 39 enables the Director of Child Welfare to conduct an administrative review of the Crown wardship of any child who has had that status for a continuous 24-month period.

Reporting of child abuse
Section 47(1) defines child abuse for the purpose of the reporting laws as a condition of physical harm, neglect or sexual molestation inflicted or permitted by any person having the care or custody of the child. Section 48(2) imposes a special duty on professional persons to

report child abuse. Failure to comply can lead to a fine of $1,000. Information from the reports is verfied by the CAS and stored in a central child abuse register.

Legal representation for the child
Section 20 allows the court to order separate legal representation. There is a presumption that legal representation should be ordered in certain situations identified in the section.

Status reviews
Children 12 years of age or older may now bring applications for reviews of their status under supervision, society wardship and Crown wardship orders.

In general, the 1978 amendments would be retained under The Children's Act. As noted above, the main emphasis in the following discussion will be on certain key areas left untouched by the earlier amendments.

A. Grounds for involuntary intervention

One of the most fundamental parts of child protection legislation is the section that states the grounds on which an agency or court may, without the consent of parents, intervene, in order to protect children. These grounds determine when the agency may conduct an investigation, apprehend a child without a court order and initiate court proceedings, and when the court may order intervention in the form of supervision or removal of a child from his parents. The grounds should represent a minimum standard of care that all parents must provide for their children. In keeping with the Declaration of Principles, proposed above, the grounds should reflect a presumption of family autonomy by allowing a wide range of child rearing practices without state interference. On the other hand, the grounds must not defer to family autonomy to the extent that they prevent agencies and courts from providing intervention necessary to protect the health and safety of children who are truly at risk.

The existing grounds for involuntary intervention are contained in the definition of a "child in need of protection". There are several problems with the definition:

First, many of the grounds are defined in extremely broad and vague language. For example, the definition permits involuntary intervention if "a child is found associating with an unfit or improper person" or "living in an unfit or improper place" or "where the person in

whose charge the child is, is unable to control the child". Such phrases are obviously open to a wide variety of interpretations. Case law has provided some assistance by establishing that, despite the vague language, a child should not be found to be in need of protection unless the care of the child falls below the minimum standard of care in Canadian society. However, this general rule fails to give parents and children fair warning when intervention may occur and fails to give adequate guidance to agencies and courts in their attempts to protect children. Without clearly defined criteria, agency workers, in particular, are put in the unenviable position of having to make extremely difficult value judgments, based on limited information, in deciding whether or not to intervene. They are often in an almost impossible, no-win situation. If they do intervene, they may be criticized for "needlessly disrupting families". If they do not intervene, they may be criticized for "failing to stop a preventable tragedy from occurring". Of course, it is neither possible nor desirable to eliminate all subjectivity from these decisions. They will always necessarily be difficult decisions but the present legislative vagueness can be reduced considerably.

Second, most of the grounds fail to identify the specific harms from which children are to be protected. The examples given above are subject to this criticism. Another example is the clause that allows intervention if a child's "morals may be endangered by the conduct of the person in whose charge the child is". Even if it were possible to reach agreement on the meaning of these grounds, it must be recognized that they allow involuntary intervention on the basis of parental behaviour or home conditions without requiring any showing that the child is actually being harmed (or that there is a substantial risk that he may be harmed) by the behaviour of the parents or conditions in the home. The assumption seems to be that we can predict harm to the child based on parental behaviour. However, research indicates that it is very difficult or impossible to correlate such factors as parental lifestyle with specific harm to a child, especially if one is trying to predict long-range detriment to the child's development. Thus, the risk of inappropriate intervention is increased. Since the purpose of the intervention is to protect children from harm, it seems preferable to define the grounds for intervention in terms of the specific harms we are seeking to prevent.

Third, even where the present definition does focus on harm to the child, it fails to restrict intervention to cases of serious harm or the substantial risk of serious harm. There are several reasons for limiting involuntary intervention to situations involving actual or potential serious harm to children. Such a limitation supports the basic principle of family autonomy, discussed earlier. As some child welfare

commentators have noted (e.g. Goldstein, Freud and Solnit in *Before the Best Interests of the Child*) the law should not allow interference with family autonomy unless there is a serious risk to the child. There is also evidence that, except where there is a serious risk to the child, we should have a healthy skepticism about our ability to improve a child's situation through involuntary intervention. In addition, it is important to recognize that there may be some harm inherent in the intervention itself, such as the possible psychological harm to the child in being separated from his family. Once removed from his home, it may be necessary for the child to face the unsettling experience of being moved from one foster home or group home to another in order to find the most appropriate placement.

By limiting involuntary intervention to situations where the harm is serious, we can more safely assume that the intervention will be likely to do more good than harm. Children's aid societies are, of course, well aware of these issues and for years have attempted to help families on a voluntary basis, to keep children with their parents wherever possible and to resort to involuntary measures only when there is a serious risk to the child and the parents are either unable to protect their children adequately or are simply uncooperative. The legislation should be brought up-to-date to reflect this good practice.

We are recommending that the present definition of a child in need of protection be replaced by grounds that are more precise, objective and that focus on serious harm or risk of such harm to the child. More specifically, the following two-step approach should be used to determine whether or not a child is in need of protection.

First, at least one of the following conditions would have to be met:

(a) a child has suffered, or there is a substantial risk that a child will suffer, a serious physical harm. Such harm may be inflicted deliberately by the parents or may be caused by the failure of the parents to supervise or protect the child adequately.

(b) a child has been sexually abused by his parent (s) or any other person and the parents, knowing of the possibility of the abuse, failed to protect the child.

(c) a child is in need of medical treatment to cure, alleviate or prevent the child from suffering serious physical harm and the parents are unwilling to provide or to consent to necessary medical treatment.

(d) a child is suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal or aggressive behaviour toward

self or others and his parents are unwilling to provide or to consent to necessary services.

(e) a child has been abandoned.

Second, the fact that a child is endangered in a manner specified by (a), (b), (c) or (d) does not necessarily mean that a court will order some type of intervention. The court must also be satisfied that the court-ordered intervention is necessary to protect the child in the future. This requirement is to ensure that court-ordered intervention does not occur in the case of an isolated incident of harm unlikely to recur or where some voluntary arrangement would prevent a recurrence.

Whether to allow intervention as a result of purely emotional harm is one of the most controversial issues in child welfare literature. Those in favour of including this ground argue that emotional damage can be just as serious as physical harm, especially when the long-term effects are considered. They claim that the difficulties of definition can be overcome by clear and restrictive language linking the harm with specific behavioural symptoms. On the other hand, those who argue against the inclusion of this ground, focus on what they believe to be the inherent vagueness of even the most restrictive definitions. They claim that observed behaviour is not a sufficient criterion for assessing a child's mental state. Similar behaviour may, for different children, be a response to a wide range of different and possibly opposite factors. Even if "emotional damage" could be precisely defined, there is a similar lack of agreement concerning treatment and prognosis. Further, even if we knew what the "right treatments" were, psychological therapy for a young child is not likely to be useful without the on-going voluntary cooperation of the parent (s). Thus, it is argued that the disruption of a family is not justified simply on the basis of emotional harm.

Whether to include an "abandonment" ground also poses difficulty. Those who argue in its favour believe that where there is no adult caring for or willing to continue caring for a child, the child should be considered endangered. Those who argue against its inclusion claim that if a child is truly abandoned, that child will come under one of the other categories. The "abandonment" ground is thus seen as redundant. As well, there are basic difficulties in trying to define abandonment. For example, should the parent be absent for a specific period of time? If so, how long should the period be? Should there be a mental component which requires that there be some evidence of intent? Although we have included emotional harm and abandonment in the proposed grounds for intervention, we recognize that there are

strong arguments against including them and we are especially interested in your suggestions in this area.

Finally, it should be noted that unless a voluntary care agreement is being considered, the proposed grounds for intervention do not limit the agency's providing services on a voluntary basis.

B. Consent orders

The law now provides for court orders if parents are consenting to a wardship order. This should continue to be allowed. It gives parents who want to give up their child for whatever reason, a means of doing so without first having to abuse or neglect him. It also gives the child an opportunity of being placed in a family where he will be wanted and where his emotional and physical needs will be met. However, this provision is intended to respond only to situations where the child is truly unwanted. In order to ensure that this provision is limited to such situations, ***we are recommending*** that parents be given an opportunity to consult a lawyer and that the court make an enquiry to determine whether or not the consent is informed and voluntary. The court should also determine whether the parents have been offered support services that might make it possible for their child to remain with them. If the court concludes that the provision of a support service could keep the family together, ***we are recommending*** that the court be able to order the agency to provide the service. It should be noted that this authority could be exercised whenever the child was found to be in need of protection, regardless of the specific grounds. This proposed power is essentially the same as that recommended for the placement review body discussed in Chapter III and would be subject to the same limitations. The limitations require further work but, as noted earlier, they would at least place a ceiling on the cost of the ordered service.

In cases of parental consent, two other routes may be available. First, if the parents cannot care for their child because of circumstances of a temporary nature, they could enter a voluntary care agreement. Second, if they intend to give up their child permanently, they could consent to an adoption. Thus, the most likely circumstances for this consent to a wardship order would probably be where the parents do not intend to give up the care of their child permanently but a care agreement may not be extended because the time limit for such agreements (twelve months) has expired.

C. Reporting requirements

Often the first step in the process of child protection intervention is a report to the agency made by a professional person or member of the general public. The existing legislation states that everyone has a duty to report any child who falls within the broad and vague definition of a "child in need of protection". It requires professionals and officials to report any child who they have reasonable grounds to suspect is "abused" (a more narrowly defined term). A professional or official may be subject to a fine for failure to report an abused child. ***We are recommending*** that these reporting provisions be simplified so that all persons including professionals and officials would be under a duty to report any child who, they have reasonable grounds to suspect, falls within the revised definition of a "child in need of protection", discussed above. Professionals and officials would continue to be subject to a fine for failure to report.

Some contend that the duty to report should be restricted to cases of serious physical harm. Those who argue in favour of this approach claim that physical endangerment is the ground that most easily lends itself to accurate detection. Thus, they claim it is unfair to subject professionals to the threat of both criminal prosecution and the loss of client trust for failure to report harms which are any less obvious. As well, they point out that inherent in any reporting is the potential for cultural and racial bias. Because of this, they feel it may be unwise to require reports by anyone beyond physical injury to matters such as "emotional abuse", or even "sexual abuse" which are considered to be much more open-ended and subject to vast social and cultural biases in their interpretations.

The present duty of professionals and officials to report has also been criticized as possibly including an unfairly wide range of people. In short, the meaning of professional or official is unclear and therefore does not give fair warning to persons who may be convicted of an offence and fined up to $1000 for failure to report. An alternative would be to limit the range of persons to specific professionals who, because of the nature of their work, are more likely to become aware of children who are, or may be, at risk. ***We are recommending*** that the possibility of a fine for failure to report be limited to "any physician, nurse, dentist, psychologist or any other medical or mental health professional, teacher, social worker, child care worker or police

officer who has reasonable cause to suspect in the course of his professional or official duties that a child may be in need of protection". This approach, of course, does not completely remove the vagueness problem and it runs the risk of not including every appropriate professional group. On the other hand, it does provide greater clarity and, though some appropriate professionals may be missed, it is important to remember that they would still be included in the general statutory duty of all persons to report.

Another problem with the professional duty is that the law does not indicate what information the professional must provide in order to fulfill his legal duty. There has been some concern that doctors and other persons governed by a code of professional ethics are hesitant to give more than the barest of information so that they do not breach confidential relationships with clients any more than is absolutely necessary. This causes problems for an agency needing sufficient information to conduct an investigation and to make a decision as to whether further action is necessary.

We are recommending that the professional reporting duty include the duty to provide all information that formed the basis of the professional's suspicion that a child has been abused.

As mentioned earlier, the 1978 amendments established a central child abuse register. If a report of suspected abuse is verified by the child protection agency, the agency files its report with the register. The main purpose of the register is to provide a central source of information on child abuse cases so that a child protection agency can get a more complete history of a family that is the subject of a current investigation of possible child abuse. Any person identified in the register as an abuser is entitled to a hearing to determine whether or not the information is accurate. Strong feelings have been expressed both for and against the child abuse register and the Ministry has recently initiated a review of the registry system. We welcome your comments on whether the register should be retained or how it may be improved.

D. Action by agency

After receiving a report that a child may be in need of protection, the agency conducts an investigation. If it is determined that the child is not in need of protection, the agency may either take no further action, offer the parents voluntary support services (e.g., family counselling), or refer the parents, on a voluntary basis, to another service agency.

If the investigation reveals that the child is "apparently in need of protection", the agency may make an application to court, place a homemaker on the premises, enter into a voluntary care agreement or apprehend the child with or without a warrant. Apprehension or taking temporary custody of a child without court authorization is a drastic measure. Children's aid societies have acknowledged its drastic nature by being very hesitant to remove a child unless there is a very serious risk to him. Ministry guidelines have supported this basic approach and it should also be reflected in the legislation. ***We are recommending*** that such temporary custody should, by law, be limited to narrowly defined emergency or high risk situations. It should occur only where there are reasonable grounds to believe that continued parental custody would create a substantial risk of serious physical harm to the child or sexual abuse of the child and no other arrangement (e.g., homemaker services, placement of the child with a relative or neighbour) is available to protect the child adequately. Emotional harm is excluded as a basis for emergency custody because, as mentioned earlier, it is such a subjective concept. In addition, it is quite possible that the emergency intervention itself may cause some emotional damage to the child. Some commentators disagree with this proposed exclusion. On the other hand, others argue that, in addition to emotional harm, sexual abuse should be excluded for the same reasons as emotional harm. We especially welcome your comments in this area.

The existing legislation does not provide guidelines for using an ordinary application to court (i.e., an order to produce) or, if an apprehension is to occur, whether or not a warrant should be obtained. ***We are recommending*** that there be a strong preference in the Act for using the least restrictive or drastic means of bringing the matter to court. The ordinary application to court should be the preferred route. Where apprehension is considered necessary, a warrant authorizing such apprehension should be obtained. Only where the risk to the child is so great that time does not allow for the obtaining of a warrant should the agency be able to apprehend the child without a warrant. This approach appears to be generally consistent with CAS practice and current Ministry guidelines. Some jurisdictions forbid emergency removal of a child without a warrant or court order. Their approach is almost the extreme opposite of our present Act and seems to be too rigid to permit adequate responses to real emergencies. Our recommendation represents a middle ground that would allow flexibility where immediate action must be taken, but would also provide a clear legislative directive that, except in the most urgent circumstances, the agency should have to explain to an independent third party why the removal was necessary.

E. Custody during adjournment

During the court proceedings, it is usually necessary to adjourn the hearing and the court must determine who should have custody of the child during the adjournment period. Given the fact of frequent court delays through numerous and long adjournments, the child may be in limbo for several months before there is a determination of whether he is in need of protection. Although the existing Act requires the agency to show cause why the child should be in the custody of the agency, there are no legislative criteria to govern this decision and there is uncertainty regarding the meaning of show cause. ***We are recommending*** that the Act provide that the child should remain with, or be returned to, the parents during the adjournment period unless the agency can show there are reasonable grounds to believe that (a) one of the grounds for intervention is met and (b) no other arrangement is available to protect the child adequately during the adjournment period (e.g., supervision by the agency; homemaker service; placement with a relative or neighbour). Even though the rules of evidence would continue to be fairly broad, this provision would offer greater clarity and direction than now exists. The court should also presume that, if emergency apprehension of the child by the agency were not required, the child should remain with the parents during this interim period. In addition, ***we are recommending*** that, if the court concludes the child must be in the custody of the agency during the adjournment period, the court should be required to consider the child's need for contact with the parents and, unless supervised contact would be detrimental to the child, make an interim access order.

We are also recommending that the law clearly provide the court with the authority to order agency supervision of the family during an adjournment period if the court finds that otherwise, the child would have to be removed from the home and also finds that such supervision would provide sufficient protection for the child. The present law is not explicit on this point but some judges make such orders. Others feel that they lack necessary legislative authority. Interim supervision orders are less drastic than custody orders and should be encouraged by the law in cases where the child can be protected adequately by this type of limited agency involvement. It can be argued that the benefit to the child remaining with his family, albeit with agency supervision of the parents, outweighs the potential problems associated with allowing a supervision order prior to finding the child to be in need of protection. This approach would also reduce the number of cases of children having to be taken into care.

It would also be desirable to have some reasonable time limit on the total length of the proceedings. The current Act specifies that an adjournment period may not exceed thirty days except with the consent of the parties. There is no limit on the number of adjournments and, as noted above, it is not unusual for several months to pass before a final order is made. ***We are recommending*** that, before ordering an adjournment, the court be required to consider the effect upon the child of any delay in the final disposition of the proceedings. In addition, the court should be required to make a final order within a certain number of months (e.g., three months) from the commencement of the proceedings. We realize that, with respect to this latter proposal, there are practical problems such as backlogged courts. However, in light of the child's sense of time and the possible negative impact of extended proceedings on him, the issue is important enough to be given serious consideration.

F. Disposition

If the court determines that the child is in need of protection, it must also decide whether the child should be placed with or returned to the parents or other person, subject to supervision by the agency, or be made a society ward or Crown ward and committed to the care of the agency. This dispositional decision should be kept quite separate from the preliminary issue of whether or not the child is in need of protection. Evidence relevant to which disposition is appropriate may be irrelevant or even prejudicial to the parents and child if considered at the adjudication stage. For example, evidence that the agency has found the "ideal" foster home for the child would be appropriate at disposition but would be irrelevant to the issue of whether or not the child has been harmed (or is in danger of being harmed) within the meaning of the grounds for intervention. Therefore, ***we are recommending*** that evidence which may be relevant at disposition, but irrelevant to the issue of whether the grounds for intervention have been met, should not be admitted before the court makes a finding that the child is in need of protection. This recommendation falls short of requiring separate hearings on the two basic issues before the court. Although some jurisdictions do require separate hearings, most notably where termination of parental rights is being considered, we feel that this approach may be too rigid and could unnecessarily add to the total length of court proceedings.

The 1978 amendments require the agency to present a plan to the court in order to assist the court in determining which dispositional order to make. This requirement should continue.

However, the current legislation does not specify what type of information should be contained in the plan. ***We are recommending*** that the Act or regulations require that the plan contain:

(a) a description of the services that will be provided to remedy the specific harms causing the child to be in need of protection and the reasons why such services are likely to be useful;

(b) a statement of the factors (e.g., specific changes in parental behaviour) that will be used to indicate supervision or wardship is no longer necessary;

(c) an estimate of the time in which the goals of intervention should be achieved;

(d) if removal from parental custody is proposed:

- a description of why the child cannot be protected adequately in the parents' home, including a description of any previous efforts to help the family in the home, and

- a statement of what efforts, if any, will be made to maintain parent-child contact;

(e) if permanent removal is proposed, a description of what arrangements have been made or are being made for long-term, stable placement for the child.

This recommendation is very similar to current Ministry guidelines that suggest plans should be individualized, time-limited and goal-oriented.

We are also recommending that the Act provide that, except with permission of the court, the plan be in writing. This proposal is essentially the same as a provision of the proposed Young Offenders Act dealing with pre-disposition reports.

The court is currently required to make a dispositional order (i.e., supervision, society wardship or Crown wardship) it considers to be in the best interests of the child. In general, the court does not have the authority to make specific placement decisions (e.g., whether a child should be placed in foster home "A", group home "B" or residential

treatment centre "C"). These decisions are made by the agency acting under the authority of a wardship order. The one exception is if the court does not return the child to the parents but places him with some other person subject to the supervision of the agency. In short, the court can make a supervision order or it can transfer guardianship of the child from the parents to the agency under either a society wardship or Crown wardship order.

A major amendment in 1978 was the inclusion of a definition of "best interests" that introduced some substance and clarity regarding the term by listing various factors to be considered by the court in making its dispositional decision. These factors are to be considered in addition to all other relevant considerations and include:

- the mental, emotional and physical needs of the child, and the care and/or treatment appropriate to meet those needs,

- the child's opportunity to enjoy a parent-child relationship, and to be a wanted and needed member within a family structure,

- the child's mental, emotional and physical stages of development,

- the effect on the child of any disruption to his sense of continuity,

- the merits of any plan proposed by the agency that would care for the child compared with the merits of the child returning to or remaining with the parents,

- the child's views and preferences, if such views and preferences can reasonably be ascertained,

- the effect on the child of any delay in the final disposition of the proceedings,

- any risk to the child of returning him to or allowing him to remain in the care of the parents.

The definition of best interests should be retained and ***we are recommending*** that two additional factors be included: the harm or risk to the child justifying intervention and the child's cultural background. The harm or risk to the child is a fairly obvious consideration. The child's cultural background is an especially appropriate factor where the issue is whether or not a native child should be removed from his home and his community.

In addition to considering the best interests factors, ***we are recommending*** that the court be required to apply the least restrictive alternative principle as reflected in the following dispositional guidelines:

(a) The court should not order a child removed from his home unless it is satisfied that in-home services and other less restrictive alternatives have either failed, been refused by the parents, or would be inadequate to protect the child from a recurrence of the harm justifying intervention. This guideline builds on the 1978 amendment requiring the court to consider what, if any, efforts have been made to assist the child within the home.

(b) If the court concludes the provision of a non-residential service could prevent a child in need of protection from being removed from his home, it may order the agency to provide the service. This power is the same as that recommended above for the court under the heading "Consent Orders" and for the placement review body in Chapter III. The same limitations, including the ceiling on the cost of the order, would also apply in this situation.

(c) If the court decides removal from the home is necessary, it should presume that placement with a relative or neighbour or some other member of the child's own community is preferable to placing the child in the care of an agency. We recognize that there are situations where such placements may be virtually impossible. For example, placing a child with a relative or neighbour may create serious problems if the parents strongly resisted the removal of their child.

(d) Crown wardship should not be ordered unless the court finds that there is little likelihood conditions will be remedied so the child can return to the parents. This simply reflects current case law.

Some would argue in favour of an additional guideline: if the court decides a wardship order is necessary, it should presume that, except in cases of abandonment, some period of temporary or society wardship should be tried before a Crown wardship order is made. The rationale is that, since Crown wardship can lead to a permanent termination of the parent-child relationship and the adoption of the child, extreme caution must be exercised before making such an order. In addition, the proposed guideline is only a presumption, not an absolute rule. In other words, it simply suggests a starting point for the decision-making process and can be rejected if the evidence clearly indicates that it would be in the best interests of the child to proceed directly to Crown wardship status. This approach, of using a presumption, is in contrast to recent law reform proposals in other

jurisdictions making it an absolute rule that, except in cases of abandonment, permanent termination of the parent-child relationship may not be ordered unless preceded by at least six months of temporary wardship. On the other side, it is argued that most judges are already extremely hesitant to make Crown wardship orders and that they sometimes use temporary wardship as a way of putting off the more difficult decision of ordering Crown wardship. A presumption in favor of temporary wardship, it is argued, would only encourage indecision and delay and thus be unfair to children who may be left in limbo for an unnecessarily long period of time. We welcome your comments on this issue.

Wardship

At present, there are two types of wardship: Crown wardship and society wardship. When a child is made a ward, either the Crown or the children's aid society assumes all of the rights and responsibilities of a child's legal guardian for the purpose of the child's care, custody and control. Under Crown wardship, nearly all of the rights and responsibilities are delegated to the agency. The major difference between the two types of wardship is the effect on the parent-child relationship. Society wardship is temporary – the order may not exceed twelve months, although it may be renewed for an additional twelve months. Crown wardship can result in the adoption of the child and thus a permanent termination of the parent-child relationship. ***We are recommending*** that more straightforward terms be used to describe the two situations: temporary guardianship and long-term guardianship. Of course, there are also problems with these terms (e.g., long-term guardianship will not necessarily always be very long), but they seem to more accurately reflect the nature of the relationships than do the current terms.

We are also recommending that, if a temporary guardianship order is made, the parents should retain the right to consent to major medical decisions (unless the failure to give such consent was the basis of the guardianship order) and to the child's marriage, unless the court finds the parent's refusal to consent would be seriously detrimental to the child. In addition, ***we are recommending*** that, if a temporary guardianship order or a long-term guardianship order with parental access is made, the agency should consider the parents' views, if any, in other major decisions regarding the care or placement of the child. Also, in all cases where they are ascertainable, the views of the child should be considered in making major decisions. A general goal behind these recommendations is to encourage parental participation in as many of the decisions regarding the child's care as possible, thus providing the child with a greater sense of continuity, especially

in those cases where the parents will eventually be resuming his care. Ongoing parental participation has been shown to be related to the successful placement of a child in care and it can help to prevent problems which may otherwise develop when the child returns home. Both the Ministry's foster care standards and residential standards strongly emphasize the need for parental involvement.

Access

If the court orders that a child must be removed from his home, another dispositional issue is whether the court should make an access order under which parent-child contact is maintained. No guidelines, other than the general "best interests" factors, are present in the existing legislation. ***We are recommending*** that, if the court orders temporary guardianship, it should also make a parental access order unless it finds continued parent-child contact would be detrimental to the child. Under this general standard, the assumption is that continued parent-child contact is desirable unless the agency can demonstrate that an access order is likely to have harmful effects on the child. The court should presume that access would not be detrimental where a child twelve or older wishes to maintain contact with his parents. Where the court makes a long-term guardianship order, ***we are recommending*** that it should presume that access would be appropriate where:

(a) at the time of disposition, permanent family placement is not planned or possible and parental access will not impair the child's opportunity for a permanent placement in a family setting;

(b) a child twelve or older wishes to maintain contact with his parents; or

(c) the child is to be placed with a family willing to provide permanent care but not wishing to adopt.

G. Reviews

Under The Child Welfare Act, any order may be reviewed by the court on the application of the agency, the parents or the older child. The agency may apply at any time; parents and children may apply after six months. For society wardship, the agency is required to bring the matter back to court before the expiration of the order. For Crown wardship, there is an additional administrative review every 24

months and each review may trigger a court review. ***We are recommending*** that the following provisions be added to the existing review scheme:

(a) With the permission of the court, parents and older children should be entitled to a review within the six-month period if a major element of the agency's plan has not been carried out and they seek a change in the order of the court.

(b) All child protection agencies should be required to have an internal review procedure to hear complaints from their clients, the procedure to include access to the agency's board. Parents and children would be entitled to use this procedure to air their complaints regarding service being provided by the agency. If the complaint cannot be resolved at the agency level, they could, as now, take the matter to the Director of Child Welfare who exercises the Ministry's overall supervisory responsibility in child welfare matters, or to the Minister. It is, anticipated however, that most matters could be resolved at the internal review level, thereby avoiding the need to refer cases to the Ministry.

Considerations at review hearings

If a court is asked to review the status of a child who is the subject of a supervision or wardship order, it may change or modify the order, including ordering the termination of intervention. In making this decision, the court is required to have regard to the best interests of the child. As in the situation of the initial disposition, it may be useful for the legislation to provide additional factors or guidelines to assist the court in making the status review decision. ***We are recommending*** that the court be required to consider:

(a) whether the conditions that required initial intervention still exist;

(b) what services have been provided to or offered to the parents;

(c) whether the parents are satisfied with the delivery of service;

(d) whether the agency is satisfied with the cooperation given to it by the parents;

(e) whether additional services are needed.

In addition, ***we are recommending*** that, if the court concludes that intervention cannot be terminated at the time of the hearing, the expected date of termination also be considered at the review hearing.

H. Agency placement of children

The agency with guardianship of a child has the difficult responsibility of finding an appropriate residential placement for the child. The current Act provides little guidance for agencies trying to fulfill this responsibility, other than the general directive that the placement should be according to the needs of the child. Ministry guidelines provide some assistance by suggesting that the agency should (a) try to place the child in the community that is familiar to him; (b) be sensitive to the child's desire to maintain the continuity of relationship with people who are important to him; (c) try to place the child in a resource of his own cultural and linguistic heritage. These guidelines are quite consistent with the proposed Delaration of Principles, particularly the least restrictive alternative principle. ***We are recommending*** that this approach be reflected in the Act by specifying that placement of the child should be in the least restrictive alternative, as defined in the proposed Declaration of Principles. In addition, the child should, wherever possible, be placed in a resource of his own cultural and linguistic heritage. This would be of particular importance, for example, to native children. Also, as previously suggested, the wishes of the child, if ascertainable, should be taken into account in making major decisions. Finally, the parents' views should also be considered if the court has ordered temporary guardianship or long-term guardianship with access.

It would be consistent with the above recommendation to restrict the placement of children outside Ontario. Such placements have been of particular concern to native people. Some U.S. child welfare agencies have released data which indicates that virtually all of the native children they have placed for adoption have been from Canada. ***We are recommending*** that placement of a child outside Ontario not be permitted unless the agency can prove to the satisfaction of the Director of Child Welfare that extraordinary circumstances justify such a placement.

Another placement issue concerns the admission of children to institutions, defined in Chaper 3 as large, self-contained residential facilities. In that chapter we recommended that there be a pre-admission review of the parents' decision to admit their child to an institution. This provision, which would apply only to long-term admission, would help to guarantee that institutional placement is the least restrictive alternative appropriate in the circumstances. If a child is determined by a court to be in need of protection and a guardianship order is made, the agency assumes the parental role and places the child in a foster home, group home or institution. The fact that it is an agency acting as parent, instead of the actual parent, who is seeking the

admission of a child to an institution affects neither the seriousness of the decision nor the need for independent, pre-admission review. Nor is the need for review diminished because a court has been involved. The court order is limited to transferring guardianship to the agency and thus indirectly authorizes some form of residential care but it does not address the question of whether or not the child should be institutionalized. In order that all children, regardless of whether they are in the custody of a parent or an agency with guardianship authority, receive similar procedural protections, ***we are recommending*** that there be an independent pre-admission review of the decision to place a child found to be in need of protection in an institution. Since this approach could result in a placement review body hearing shortly after the court hearing, it would seem to be preferable in this situation to have the court determine both the guardianship and the institutional placement issue. Obviously, the court would have to apply the same criteria, specified previously, to determine the appropriateness of admission.

Another issue relevant to this section is whether or not a child, after being placed by the agency, should be entitled to access to his lawyer. This can be of obvious importance if a child wishes to exercise a legal right such as initiating a court review of his status. ***We are recommending*** that a child in the care of an agency be entitled to communicate and meet with his lawyer without the consent of the agency.

I. Teenage mothers

Unmarried teenage mothers have received considerable public attention recently. An issue for the legislation is whether special provisions are needed to ensure that the children of these young mothers are adequately protected.

For example, some have suggested that children of unmarried teenage mothers should be presumed to be in need of protection. This would be an extreme response, but other possibilities include requiring the mother to explain to the agency or the court what plans she has for the care of the child; imposing a duty on the agency to investigate and offer voluntary support services; imposing a duty on the mother's doctor to refer the mother to a social service agency, such as the social services department of the hospital, but not (or not necessarily) to a child protection agency.

The more extreme approaches are clearly unacceptable. However, we are interested in readers' reactions to some of the other possibilities mentioned above.

J. Role of the lawyer

Section 20 of The Child Welfare Act establishes that a child may have legal representation in child protection proceedings. If a child does not have legal representation, the court may order that it be provided if the court determines such representation is desirable to protect the interests of the child. An issue that has been the subject of much debate is that of the role of the child's lawyer in child protection proceedings. Should the child be treated as any other client, the lawyer acting according to the wishes of the child? Or should the lawyer act according to what is, in the lawyer's opinion, the best interests of the child, which may conflict with the child's wishes? In addition, does the solicitor-client privilege prevent the lawyer from disclosing information which he has learned from the child which does not support the child's position, even if the information indicates that the child may be at risk of harm?

The Law Society of Upper Canada was recently requested to address these issues in order to provide guidance to the increasing number of lawyers who are representing children. After reviewing the case law and the submissions of a wide variety of individuals and organizations (including this Ministry) the Law Society concluded that the wording of section 20 is ambiguous and could encompass both a "best interests" and a "child's wishes" interpretation of "legal representation". However, in the Law Society's opinion, the better interpretation is that the ordinary solicitor-client relationship would exist and that the lawyer must follow the instructions or wishes of his client and that solicitor-client privilege applies. The Law Society did not feel there is any distinction between the role of the lawyer who is retained independently of section 20 and that of the lawyer who represents a child as a result of a section 20 order. The Law Society also concluded that, in accordance with the ordinary rules of professional conduct, the lawyer must determine whether or not the child has the capacity to give instructions. If the child can accept the consequences of his acts and decisions and understands the nature of the proceedings and can express a preference as to its resolution, the child would be considered to have the necessary capacity. If the lawyer concluded that the child lacked capacity, the lawyer should so advise the court.

The Law Society's views are very similar to the position of this Ministry and many other interested organizations and individuals. In light of the ambiguity in section 20 identified by the Law Society, ***we are recommending*** serious consideration be given to including in the Children's Act specific provisions clarifying the role of the lawyer in child protection proceedings. We are not, at this time, making a specific legislative proposal but we welcome comments on the issue.

K. Detention of children in observation and detention (O/D) homes

The Child Welfare Act provides that a child apprehended as apparently in need of protection may be detained in a place of safety. The definition of place of safety includes designated observation and detention homes that are also used for the detention of young offenders. The Act also provides that children who run away from the care of a CAS may be detained in a designated O/D home but must, "as soon as is practicable", be brought before the court, which may discharge the child or confirm the detention for a period of up to thirty days. ***We are recommending*** that the Act reinforce the secure detention provisions by specifying that secure O/D homes may not be used as places of safety under the child protection part of the Act. ***We are also recommending*** that, under the child protection part of the Act, a child not be held in the less secure O/D homes (e.g., semi-secure homes that are generally open but contain at least one locked room) unless the court is satisfied no less restrictive setting, not used for holding offenders, is feasible. In addition, children held in O/D homes on the basis of being in need of protection should be entitled to a release hearing within 24 hours or as soon as practicable - i.e., the same rule that applies to young persons charged with committing crimes who are detained in the same O/D homes.

L. Child abandoned in institution

Section 24 of The Child Welfare Act provides that, if a child is in the care of an institution or home and no parent can be located, an officer of the institution or home, after making reasonable efforts to locate a parent, shall notify a CAS and apply to a court which may determine the child is in need of protection, even if he does not fall within the meaning of a child in need of protection. This section is rarely, if ever, used and would be adequtely covered by the proposed revision of the definition of a child in need of protection that specifically includes abandoned children.

Therefore, ***we are recommending*** that section 24 be deleted in The Children's Act. For a more complete discussion of the issues pertaining to children in residential care who have little or no contact with their parents, see Chapter 3, Voluntary Access to Services.

M. Lay panels

Some jurisdictions have established lay panels to sit with judges hearing child welfare cases. Lay panels were developed for this purpose in Scotland and Sweden and have been both positive and negative evaluations. Indian lay panels have also been used in Frobisher Bay, Northwest Territories and Christian Island, Ontario, in cases arising under the Juvenile Delinquents Act although that statute restricts the panel to acting solely as an advisor to the judge. The Christian Island program seems to have had very good results.

The British Columbia legislation provides that a judge can sit with a panel of two lay persons in child protection cases whenever the child, the parents, the judge, the family advocate or the Superintendent of Child Welfare so requests. The panelists are specifically selected from the community for this purpose because of their concern for the welfare of children and families within their community, as opposed to being chosen randomly to reflect the community. They are not required to possess any special expertise, only special interest, and are expected to come from all walks of life.

The panel of two sits with the judge to decide all questions concerning the finding of neglect, other than jurisdictional or strictly legal questions, and to determine the disposition of the case. They do not advise the judge, but, rather, they decide the matter in conjunction with him. A majority decision governs the outcome of a case. If, for some reason, the panel consists of only one lay member, any disagreement is resolved by the judge having a further vote.

Because of the large number of Indian children involved in these matters and the desire to respect their cultural values, a special roster of Indian people was recruited for all cases involving Indian children.

Since there does not appear to be any written evaluation of this lay panel pilot project in British Columbia, it is difficult to comment on its success. The B.C. Royal Commission of Family and Children's Law did have a chance to observe its early workings and concluded it should be extended throughout the province. The commission further recommended it also be used in juvenile delinquency cases if subsequent evaluations showed it was successful.

In general, the concept of a lay panel system is a very attractive one in our multi-cultural society. It appears to be especially valuable in dealing with Indian children as a means of further ensuring that the previous recommendations concerning cultural sensitivity will be

implemented. ***We are recommending*** serious consideration and investigation of a lay panel system for child protection cases, with a special roster for native children.

N. Native children and families

As Philip Hepworth notes in *Foster Care and Adoption in Canada*, in 1977 about twenty per cent of all children in the care of child welfare agencies in Canada were native children. In Ontario, approximately nine per cent of children in care were native children as were almost nineteen per cent of children in the care of northern Ontario agencies. Thus, there is a disproportionately high number of native children removed from their families. There is also evidence that once native children, especially status Indian children, have been admitted into care, they are less likely than non-native children to return to their parents. In addition, they are likely to experience more frequent moves than non-native children while in care. Thus, many native children grow up being so dislocated in terms of their culture, their race and their family, they have no clear sense of their identity and no home to which they can return.

The law, of course, can not solve all of these problems but there are several legislative recommendations in this paper that could improve the situation for native children and families, including:

Providing services in a culturally sensitive manner
The proposed Declaration of Principles places a responsibility on government, child and family service agencies and other agencies serving native families to provide their services in a manner sensitive to the cultural values of native people. The Ministry is currently taking this approach with the native child welfare prevention programs that employ native people to work with families and band councils on reserves. The aim is to develop strategies for the care of children that prevent the need for apprehension. The program guidelines require joint planning by children's aid societies and native people as a condition of funding. This program is simply one current example of how the general principle can be applied. Inclusion of the principle in the legislation should encourage the recruitment of native foster parents, the development of family support and other services within the native community, the hiring of native child care workers and, with the assistance of Indian and Metis organizations and band counsels, the sensitization of non-native staff to the cultural values of native people.

Native representation on boards of directors
In Chapter 2, "The flexible service system," we recommended that, where native children and families are being served in sufficient numbers by an agency, the agency's board of directors include native people representative of the local native community.

Native agencies
In the funding proposals in Chapter 2, there is considerable potential to re-design the local service system, including the establishment of specialized services to meet the specific needs of the local community. It will be recalled that we have recommended that the Ministry could, after negotiations with a local band council, establish an Indian child and family service agency to serve Indian families.

Child protection intervention
A major thrust underlying the proposals regarding involuntary child protection intervention is that family autonomy must be respected by allowing a wide range of child rearing practices without state interference. This approach is reflected in the proposed grounds for intervention, limits on apprehension, and agency custody during adjournment periods and disposition. It must be demonstrated that all alternatives less restrictive or drastic than removing the child from his family would be inadequate to protect the child. In addition, the child's cultural background must be taken into account. Similar recommendations are made with respect to placement decisions by the agency, including a strong preference for placing the child within his own community and a restriction on out-of-province placement of children.

In addition to the above recommendations, it is necessary to address other areas of particular relevance to native families. In keeping with the principle of providing services in a culturally sensitive manner, ***we are recommending*** that a child and family service agency serving native families be required to consult with native organizations within its local area on delivery of agency services. This is consistent with the earlier recommendation regarding native representation on the board of directors. The consultation could take various forms, including:

(a) general discussions with Indian associations, Metis organizations and band chiefs on the role and function of the agency and its relationship with native people;

(b) obtaining the cooperation of Indian and Metis resource people in assisting staff in periodic awareness training and in individual cases;

(c) discussions with the chief of a band or leader of a native association about available alternatives that would avoid the necessity of removing a child from his family or his community.

Another area concerns notice and legal standing. ***We are recommending*** that the chief of a status Indian child's band be entitled to notice of and legal standing in child protection proceedings involving a status Indian child. This type of requirement currently exists in British Columbia legislation and seems to be an appropriate means of ensuring that a court is aware of the cultural aspects of a case. Although it would be desirable to have a similar provision for non-status Indians, it is not as easy to determine who should receive the notice and have legal standing.

A final issue concerns the court. It has been argued that judicial responsibility for child protection cases should be transferred to native people either through the appointment of native people as family court judges or through the establishment of Indian tribal courts. There are no native judges in Ontario but there are approximately nine Indian and Metis people who have been appointed as justices of the peace. In the U.S., the Indian Child Welfare Act gives a native family the choice of having its case heard by the regular state court or by an Indian tribal court. Before making any recommendation in this area, we feel there is a need for further review of the experience in the U.S. and further discussion, especially with native people.

5.

Young offenders

Young offenders

In February, 1981, after extensive consultation, the federal government introduced in Parliament Bill C-61, the Young Offenders Act (YOA), to replace the 73-year-old Juvenile Delinquents Act (JDA). The bill was passed in July, 1982. In order to allow time for implementation, the federal government plans to delay proclamation of the Act for approximately one year.

The philosophy underlying the Act, as reflected in its Declaration of Principle, appears to be a mixture of several different and, possibly, conflicting principles, including:

(a) *Accountability* - young persons are expected to bear more responsibility for their illegal acts, although not to the same extent as adults.

(b) *Paternalism* - young persons have special needs and therefore may require guidance and assistance.

(c) *Protection of society* - society has a right to be protected from the illegal acts of young persons.

(d) *Due process* - young persons charged with offenses should have basically the same procedural protections that are granted to adult accused.

(e) *Least restrictive alternative* - where intervention is necessary, young persons should have a right to "the least possible interference with freedom, having regard to the protection of society, their own needs and the interests of the family".

(f) *Determinate sentencing* - the length of a disposition should not exceed two years and a young person should not receive a disposition more severe than an adult could receive for the same offense.

The basic stages of the process under the JDA - arrest, laying of the charge, detention, adjudication, disposition and review of disposition - are retained in the YOA. However, the Act incorporates some major changes that have significant legislative and administrative implications for the provinces. Ontario has formed an inter-ministerial committee, chaired by this Ministry, to respond to the proposed legislation. The issues discussed below have been considered by the committee and are included in its consultation paper entitled *Implementing Bill C-61, The Young Offenders Act.*

Although it is undecided at this point whether all provincial legislative changes dealing with issues raised by the YOA will be included in the Children's Act, it is probable that a great number will be. In order to provide a comprehensive picture of how possible provincial

legislation affecting young offenders would relate to the other proposals made in this paper, this chapter summarizes the inter-ministerial paper and adds some further comments on those areas most directly relevant to the approach underlying our proposals. This chapter also reflects recent YOA amendments which were made after the release of the inter-ministerial paper.

It should also be noted that, at the time of writing, the YOA is still being considered by Parliament. Since provincial legislation is dependent to a great extent on the final wording of the YOA, it is possible that the proposals in this chapter will have to be changed in order to accommodate amendments to the federal bill.

A. Jurisdiction

The YOA will cover only those young people charged with offenses against the Criminal Code and other federal Acts (e.g., Narcotics Control Act). Unlike the JDA, it will not apply to violations of provincial Acts (e.g., Highway Traffic Act; Liquor Licence Act; Education Act) or municipal by-laws. Nor will it include the JDA offenses of "sexual immorality or any similar form of vice".

Under the YOA, the minimum age at which a young person can be charged will be raised from seven to twelve years. The maximum age will be seventeen. Unlike the JDA, the maxiumum age will be uniform across the country. Thus provinces will no longer have the option available under the JDA of setting the maximum age at fifteen or sixteen. In Ontario, the maximum age under the JDA is fifteen. Provinces will be allowed three years to adjust to the higher age requirement.

Several major jurisdictional issues for the province are raised by the federal proposals: (1) How should provincial and municipal offenses (e.g., liquor and traffic offenses) committed by young persons be handled? (2) What should be done with truancy and (3) sexual immorality? (4) What response should there be to children under twelve who commit what would be an offense if they were older?

Provincial Offenses: Ages 12-17

The province has three basic options for responding to persons between the ages of twelve and seventeen who commit provincial offenses:

(a) The Provincial Offenses Act;

(b) The Young Offenders Act; and

(c) some combination of (a) and (b).

The Provincial Offenses Act

The Provincial Offenses Act is intended to provide a simple and flexible procedure for dealing with adults who violate provincial laws. It establishes different methods of prosecution, depending on the seriousness of the offense.

Under Part I, used for 95 per cent of the charges, a law enforcement officer may serve the defendant with a ticket (i.e., an "offense notice"). The defendant has three options: (1) to plead guilty and pay the set fine shown on the ticket without having to appear in court; (2) plead guilty with an explanation and appear before a justice to make submissions as to the fine; or (3) plead not guilty and request a trial. If he does not exercise one of these options within fifteen days, the court may enter a conviction and impose the set fine. The officer also has the alternative under Part I of issuing a summons instead of an offense notice and, in that case, a trial will be held.

Penalties under Part II are limited to three hundred dollars or the maximum stipulated in the statute that creates the offense, whichever is the lesser. The set fine is the amount established by the court for use on the offense notice. A term of imprisonment cannot be imposed under Part I except as a last resort, where a defendant has failed to pay the fine and all reasonable methods of collecting the fine have failed or would not likely result in payment within a reasonable time.

Under Part III, offenses are dealt with in a more formal and traditional manner. If, after an information is laid, a summons is issued by a justice of the peace, a trial is held. If the defendant is convicted, the court may impose any sentence permitted by law. The limitations under Part I regarding imprisonment and maximum fine do not apply under Part III.

The Provincial Offenses Act seems to offer many advantages for responding to provincial offenses committed by young persons. The Act's simple and informal procedure reflects the less serious nature of the offenses. It offers the possibility of avoiding court appearances for minor offenses. It should also be noted that arrest and detention of the young person would be permitted only if the statute allegedly violated (e.g., The Highway Traffic Act) specifically provides for such

authority. The procedure could be less intrusive than the YOA in that emphasis is clearly on responding to the offense, not other difficulties in the young person's life. The sentencing options are limited and it is unlikely that a young person would be removed from his home as a result of committing a provincial offense.

On the other hand, there could be major difficulties in trying to apply the Act to young persons. The Act is designed for adults and is based on the assumption that defendants have the ability to pay fines. This may be an invalid assumption with respect to twelve to fifteen-year-olds who are legally required to be in school and are excluded from most areas of employment. Thus, a major advantage of the Act – settling the matter out of court – would probably be unavailable to many of the young persons charged.

In addition, the Act places the responsibility on the defendant to assert his legal rights and it may be unfair to expect young persons, especially twelve and thirteen-year-olds, to fully understand their rights, duties and the consequences (e.g., imprisonment) that may result from failure to pay a fine. Other less fundamental problems that probably could be corrected with simple modifications include (a) the use of the adult criminal court, which has little experience in dealing with persons under the age of 16; (b) many of the possible fines are extremely high, even for young persons with some source of income; (c) holding young persons in adult facilities for failure to pay fines would be clearly inappropriate; and (d) notice to parents is not included in the Act.

The Young Offenders Act

In many ways, applying the YOA to provincial offenses would be a continuation of the present procedure under the JDA. One court using one Act would deal with both federal and provincial offenses committed by persons under the age of 18. All cases would be handled in court; payment of a fine out of court would not be possible. A full range of dispositions, including committal to custody, would be available to the court. Unlike the JDA, the YOA would place a greater emphasis on the legal rights of the young person.

A major advantage of using the YOA is simplicity. The use of one Act and one court for all offenses by young persons would probably make the system easier to understand for all involved – young persons, parents, police officers, victims and others. In addition, both the Act and the court have been designed to deal specifically with young persons

in conflict with the law. The Act also provides greater flexibility than the POA with respect to non-custodial dispositions including: absolute discharges, fines not in excess of $1000, compensation for damage to property, restitution, personal service for the victim, community service and probation. In light of the limited financial resources of most young persons, personal service for the victim and community service would be especially appropriate alternatives to imposing a fine. Reviews of disposition are also available to monitor the performance of the young person.

On the other hand, the full application of the YOA can be seen as an over-reaction to what is, in most cases, relatively minor behaviour. Committal to custody for up to two years and a fine of $1000 are very serious consequences. In addition, this approach would imply the possibility of arrest and detention for any young person charged with committing a provincial offense. Finally, there is potential for greater intrusiveness in the availability of clinical assessments and pre-disposition reports.

A combination of YOA and POA

In light of the various advantages and disadvantages of the two Acts, a combination of the two approaches is worth considering. An example of one of the many possible ways of combining elements of both the YOA and the POA is the following, which addresses most of the key issues. The procedure under the YOA for initiating proceedings and conducting hearings could be applied. The court could be the youth court. Dispositions could be limited to the non-custodial dispositions under the YOA (e.g., fine; restitution; community service; probation). As provided in the YOA, willful failure to comply with a non-custodial disposition could result in a committal to custody of not more than six months. A modified version of the scale of fines imposed on adult offenders under the POA could be developed for young persons. As under the POA approach, arrest and detention would be available only for those provincial offenses for which adults can be arrested or detained. Clinical assessments could be prohibited and pre-disposition reports could be limited to those matters directly relevant to responding to the specific offense, not other aspects of the offender's life.

Truancy

The Education Act makes truancy an offense and a truant child is liable to the penalties under the JDA. In Ontario in 1979, 326 persons under the age of 16 were convicted of truancy. Fifteen (5%) truants

were sent to training school, 37 (11%) were committed to the care of the Children's Aid Society as wards, 111 (34%) were placed on probation and 148 (45%) did not receive a penalty.

The province has several options for the future, including: (a) retain the offense of truancy; (b) use child welfare legislation; (c) deal with truancy in the educational system.

Truancy as an offense

There are problems with continuing to make truancy an offense. First, some argue that it is basically unfair. Many dispositions available to the court, especially committal to training school, are clearly disproportionate to the seriousness of the misbehaviour. The whole process is geared to blaming the child when, in many cases, the educational system may be at least equally at fault. Also, conviction in court gives the child a record of being an offender. Second, research studies provide little, if any, basis for believing that a court disposition will be effective in preventing or reducing the incidence of truancy. On the other hand, there is evidence from other provinces (e.g., British Columbia, Alberta, Quebec, Prince Edward Island) that abolition of truancy as an offense does not lead to a massive increase in the number of children habitually absent from school. Third, the labeling of the child as an offender may actually exacerbate the problem. Involvement in the juvenile justice system may be not only detrimental to his educational development but also may lead to more serious misbehaviour. Fourth, it can be considered an inappropriate use of the court system. Under the YOA there should be a shift away from the philosophy of charging children and young persons with offenses in order to help them. If obtaining help is the purpose of the truancy charge, the child welfare route or voluntary services could be used instead (as with many other types of non-criminal misbehaviour of children). The youth court could do little that is not available through these other streams. It should be mentioned that, regardless of whether truancy continues to be an offense, parents may commit an offense by failing to cause their child to attend school.

Despite the problems with continuing the offense of truancy, some argue that the offense is needed because the court is seen as a valuable alternative for attendance counsellors who are attempting to encourage truant children to change their behaviour. If truancy is continued as an offense, the options include (a) using the dispositions under the YOA, including committal to custody; (b) using the dispositions available for other provincial offenses; and (c) using existing or new dispositions that do not include removing the child from his home.

Using Child Welfare

Although the definition of a "child in need of protection" in the current Child Welfare Act specifically includes a truant child, this would be inconsistent with our proposed revision of that definition and the rationale underlying it (see Chapter 4). Therefore, there could be problems with including truancy as a basis for involuntary child protection intervention that could lead to guardianship and the suspension or termination of parental rights.

On the other hand, under our earlier proposals, truancy could be a relevant fact at the adjudication or the disposition stages of a protection hearing. In other words, the child's truancy could be taken into account with other pieces of information in determining whether he is in need of protection and, if so, whether he should be removed from his parents' custody.

This approach seems to be consistent with present practice. As noted in the inter-ministry paper, except where other factors indicate that the family situation is severe, the children's aid society tends to use voluntary counselling and mediation in these cases. These are services that can be provided just as effectively by skilled school attendance counsellors.

Dealing with truancy in the educational system

As noted in the inter-ministerial paper, this option represents an attempt to enforce compulsory education without a legal consequence or penalty for failure to attend school. There would be an increased use of trained attendance counsellors, preventive measures, school program alternatives and supportive community services. An additional element in this approach could be the establishment of an education review committee by each school board. The role of the committee would be to negotiate constructive alternatives through discussions involving the child, the parents and the local school authorities. The best approach to the problem of truancy may be the inventive use of the services that will become available under the new amendments to The Education Act, coupled with resort to early school leaving, where appropriate.

Sexual immorality

The federal government is proposing to repeal the JDA offense of "sexual immorality or any similar form of vice". The charge has

rarely been used, as indicated by 1979 Ontario statistics, which show that less than one charge in a thousand was related to sexual immorality.

The two basic options available to the province are to create a provincial offense of sexual immorality, or to use the child welfare stream.

Most of the problems mentioned earlier, regarding the offense of truancy, apply as well to sexual immorality. However, the most fundamental objection to the offense of "sexual immorality or similar form of vice" is that it is so vague it fails to give young persons fair warning as to what behaviour constitutes an offense. There is not clear consensus among decision-makers (e.g., police, judges) of the meaning of the offense and this has resulted in an uneven application of the law across the province.

The same criticism regarding vagueness also applies to the option that sexual immorality can be a basis for involuntary child protection intervention. As discussed in Chapter 4, the need for clarity and precision in the grounds for intervention is essential when the outcome may be removal of a child from his parents.

The province does not intend to make "sexual immorality" a provincial offense. If the child's behaviour, which may appear to some as sexually immoral, presents a serious risk to the child, it should fall within the more precise and objective grounds proposed for child protection intervention. If the behaviour presents a serious risk to others, (e.g., indecent assault) it should fall within the meaning of a Criminal Code Offense. For other situations, means other than a court response can be used to provide required help or to direct people to services.

Children under twelve years

The federal proposal to change the age of criminal responsibility from seven to twelve years raises the question of the possible provincial response to children under twelve who commit what would be an offense if they were older.

The practice has been that about 10 per cent of police contacts with this age group result in the laying of charges. The other 90 per cent have been handled on an informal basis by warnings, notifying parents and suggesting voluntary help from community agencies (e.g., the children's aid society). The vast majority of charges (80%) were for

break and enter (33%), theft under $200 - e.g., shop lifting (30%), and mischief (17%). The remainder included assault (3%), arson (1%), possession of stolen goods (6%), theft over $200 (2%) and offensive weapons (less than ½%). Where the charges resulted in findings of delinquency (68%), the courts did not seem to view these children as serious threats to society. Less than one per cent were committed to training school; 40 per cent received no penalty; 44 per cent were placed on probation; 8 per cent were seen as child welfare concerns and referred to the children's aid society and 5 per cent were fined.

One option would be to enact provincial offender legislation to deal with this type of misbehaviour by children under twelve. Some of the non-custodial dispositions in the YOA might be appropriate. To a large extent, this approach would permit a continuation of current practices and procedures for dealing with misconduct by children under twelve years in Ontario. In the view of some, the Juvenile Delinquents Act has served that purpose well and a similar approach might be considered appropriate. On the other hand, others may consider it inappropriate to treat such children as offenders and feel that it would be inconsistent with the federal Bill and the raising of the minimum age. Also, the present practice, as reflected in the statistics noted above, can be seen as supporting a conclusion that means other than offender legislation can be used to respond to this behaviour.

Another approach would be to use child protection legislation. The current definition of a "child in need of protection" is broad enough to include children under twelve who commit offenses. Clauses such as "found associating with an unfit or improper person" or "where the person in whose charge the child is, is unable to control the child" could be used.

However, as pointed out in Chapter 4, there are serious problems with these and other clauses in the current definition and, therefore, we recommended that it be revised. If a child committed a dangerous act toward himself or others he would, in most cases, fall within the revised definition. Also, where the behaviour (not necessarily a dangerous act) was a symptom of more serious problems, it is likely that the child could be found to be in need of protection.

Where acts of a less serious nature are committed (e.g., petty shoplifting) and do not appear to be symptoms of more serious problems justifying the usual child protection intervention, a more limited response may be appropriate. For example, a court could be given the authority to impose supervision with or without conditions by a child protection agency if a child under twelve had committed an act that would be an offense if he were older. This provision could be included as part of the child protection part of the Act. More specifically, the

court could order supervision if (a) the child had violated a federal, provincial or municipal law; (b) the child had a recent history of at least one other violation; (c) the parents had exhausted or refused all appropriate and available voluntary services for dealing with the child's behaviour; and (d) court intervention was necessary to ensure that the child was adequately supervised in the future.

In addition, it should not be forgotten that another option would be an informal or voluntary approach to at least some of the ten per cent of cases not now handled by police in this manner.

Finally, in those rare cases where the child committed a dangerous act (e.g., arson) and required psychiatric treatment, it would be possible under the proposed Secure Services Act to admit the child to a locked treatment unit.

B. Administration of the Young Offenders Act

Youth court

The present juvenile court under the JDA will be replaced by the "youth court", which is a court designated by the province for the purposes of YOA.

At present, the family courts (i.e., the provincial court, family division, and the Unified Family Court Project, Hamilton) are designated as juvenile courts. Because the structures, personnel and services available in the family court system would meet the requirements of YOA, the family court would probably be designated as the youth court.

Provincial director

The YOA provides for the designation by the province of a "person, group or class of persons or body" to perform the duties of the "provincial director". These duties would be:

- to prepare a pre-disposition report
- to place and transfer young people in custody
- to place young persons on probation in residential facilities
- to notify the prosecutor if intermittent custody is available

- to initiate disposition reviews
- to prepare progress reports
- to decide whether to place a young person in custody on probation
- to authorize a temporary release from custody
- to supervise youth workers

It is anticipated that, in law, the Minister of Community and Social Services would be designated as provincial director. In practice, the Minister would delegate duties through the Ministry's regional directors to the area managers. The area manager is the one most knowledgeable about the availability of facilities and services, the front-line staff and the needs of young persons. Also, certain responsibilities could be delegated to youth workers.

Youth worker

The YOA provides for the designation by the province of "youth workers" who would have the following duties:

- to supervise young persons on probation
- to provide assistance to young persons found guilty of an offense
- to attend court when necessary
- to prepare pre-disposition reports and progress reports
- to perform other duties required by the provincial director.

Since probation and aftercare officers now perform basically the same role under the JDA, it seems appropriate that they be designated as youth workers under the YOA. Under the earlier proposals for The Children's Services Act, probation and aftercare officers would be referred to as youth workers, not probation and aftercare officers.

Legal representation

Bill C-61 would give a young person the right to legal advice and representation at any stage of the proceedings. If the young person were unable to obtain counsel, the court would be required to direct the young person to the Legal Aid program in the province, and, if the young person were unable to obtain counsel through provincial Legal

Aid or a legal assistance program, the young person could ask the court to appoint counsel to represent him. The court would then have a duty to appoint a lawyer.

There is now no prohibition against a young person having legal representation in delinquency proceedings under the Juvenile Delinquents Act but there is no guarantee of legal representation as in the proposed Young Offenders Act. Currently, a young person may have a lawyer retained privately (e.g., by his parents) or he may seek the assistance of Legal Aid. In determining whether to grant legal aid, the Legal Aid Director takes into account the seriousness of the charge and the financial resources of the young person and his family. Problems do arise occasionally when the parents are deemed to have sufficient resources to retain counsel for the child but refuse to hire counsel because of their strong disapproval of their child's conduct. However, in such cases Legal Aid Area Directors can reconsider the case.

The province is now considering what changes, if any, should be made to the legal aid program as a result of the YOA. These considerations will, of course, take into account the possible provincial responses to (a) children under the age of twelve who commit what would be a federal offense if they were older and (b) children and young persons who commit provincial offenses (discussed above).

Alternative measures

The proposed Young Offenders Act supports the development of what are called "alternative measures". This support can be found in the initial Declaration of Principles and in the section of the Act that sets out prerequisites when alternative measures are to be used. This reflects a trend over the past decade toward the development of formal programs, usually called diversion programs, aimed at reducing the number of children who "penetrate" the juvenile justice system. Bill C-61 would legislate certain basic protections and safeguards if a young person becomes involved in any such program. It would be up to each province to determine whether to establish these programs.

Support for alternative measures tends generally to be based on the belief that certain behaviour ought not to be the subject of criminal proceedings but rather dealt with by specially designed community programs. A concern for the "labelling effect" on children of the criminal justice process and for the inconsistent exercise of discretion at various levels of the juvenile system has contributed to this belief. There is also the belief that the court system should be used more as a "last resort" for young people lest it lose its impact and deterrence value for individuals.

Support for alternative measures also reflects broader philosophical views about young people. One view is that many or most youthful offenders are children in need of help and assistance. Another view is that much of a young person's behaviour, now labelled as deviant, is part of growing up and should be tolerated, responded to in non-criminal ways, or left to the parents.

The literature on and experience with these measures, even though primarily based on the United States' experience, suggests that, at best, it is uncertain on whether such programs are able to meet the goals set for them.

Many of those involved in Ontario diversion programs feel that they have avoided the problems that developed in other jurisdictions. However, insufficient research has been done at this point, either to verify or deny the assertions of those connected with Ontario projects; one research that has been done is either insufficient or inconclusive. The Ministry of Community and Social Services will be reviewing these projects in more detail as part of the efforts to develop an appropriate policy on alternative measures.

In summary, a general endorsement of alternative measures would not be warranted at the present time until much more is known. Therefore, since administration of this section of the proposed Act will be up to the province to determine how to proceed, Ontario would not engage in major program development.

However, while this would be the general position of the province, it is intended that the following steps be taken with regard to the special needs of young persons:

(a) the ministries of the Attorney General and the Solicitor General, with assistance from the Ministry of Community and Social Services, will develop guidelines for the exercise of police discretion.

(b) the Government will continue its strong commitment to those preventive programs that focus on children who are at risk of becoming youthful offenders.

(c) the results of evaluations and experiences will continue to be studied, particularly those from Ontario and other Canadian jurisdictions. To the extent that additional demonstration is considered necessary, the emphasis would be on open accountability, basic procedural and civil rights protections and an adequate research component. There should also be a focus on practical

measures, particularly those such as restitution and community service programs designed to enable the young offender to undo his own wrong.

Detention

The YOA provides that a young person who is arrested or detained prior to disposition could be detained in a place of temporary detention designated by the province. As under the JDA, the young person would have to be detained separately from adults. Unlike the JDA, the YOA makes it clear that the Criminal Code rules regarding detention would apply to young persons. Thus, the detained young person would have to be brought before the court within 24 hours (or as soon as is practicable) for a release hearing; the criteria for release that apply to adults would apply to the young person.

Ontario's existing observation and detention homes would be used as the places of temporary detention under the YOA. Three security levels within the observation and detention system are now being developed: secure, semi-secure and open. In general, the superintendent of the observation and detention home determines which security level is appropriate for the young person. It should also be noted that home supervision would be a possibility under the court's authority to release a young person into the care of a responsible adult when the child's subsequent attendance in court can be guaranteed.

Under the proposed Secure Services Act, (which will form part of the Children's Act), admission to the most secure level of detention (i.e., secure detention) will be restricted by the following criteria: the young person must be charged with an offense for which an adult would be liable to at least five years imprisonment; he has a recent history either of previous offenses or of failure to appear for trial; and no less restrictive alternative is feasible. If the young person is detained prior to appearing in court, the superintendent determines the security level by applying the above criteria. Under the YOA, as noted earlier, the superintendent would then be required to bring the young person before the court within 24 hours for the release hearing to determine whether he should be detained or released pending completion of the YOA proceedings. If the court makes a detention order under the YOA, the Secure Services Act will allow the court to make a further determination as to the appropriate security level for the young person while in detention. If the court wishes to make this security level determination, it would apply the admission criteria mentioned above and make an order of secure detention or non-secure detention. An order of non-secure detention would give the superintendent flexibility

in choosing semi-secure or open detention as the appropriate level. An order of secure detention would require that the superintendent place the young person in the secure level. If the court chooses not to make the security level determination, the superintendent would make the decision provided that the young person could not be placed in secure detention unless the superintendent concludes that the admission criteria are met.

In sum, the YOA would govern the decision as to whether or not a young person may be detained. After a decision to detain under the YOA is made, the secure services provisions would come into play to govern the decision as to which security level would be appropriate during the period of detention.

Insanity

Under the YOA, insanity would be an issue in two ways: (1) was the young person insane at the time he committed the offense? (2) is the young person unfit to stand trial on account of insanity? In either case, a finding of insanity by the court may result in the young person's being held in "safe custody" for an indefinite period under a Lieutenant Governor's Warrant.

Under the JDA, it is not possible to find a child insane at the time he committed the offense. However, if the section 9 criteria are met, he may be transferred to adult court and found insane. It is also possible to have the child committed to a psychiatric facility under The Mental Health Act. Unfitness to stand trial on account of insanity is possible under the JDA.

The very few juveniles who are detained under Lieutenant Governor's Warrants are held in hospitals for the adult criminally insane. This practice will change under the proposed Secure Services Act. A young person found unfit to stand trial or not guilty by reason of insanity could be admitted, with the consent of the Minister of Community and Social Services, to a children's secure treatment unit to be established under the Act.

Another change from present practice concerns the review procedure for young persons under Lieutenant Governor's Warrants. The review procedure under The Mental Health Act provides for an advisory board dealing almost exclusively with adults. Reviews are infrequent, release criteria are not established and the committed person does not have the right to a hearing or to appear before the board. Under the proposed Secure Services Act, the young person would have the right

to a review hearing in family court every ninety days, clear criteria are established and the young person would be entitled to legal counsel.

Dispositions

If a young person were found guilty of an offense under the Young Offenders Act, the youth court would have available a wide range of options including an absolute discharge, a fine of up to $1,000, restitution, compensation, community service, probation, or a committal to custody. The dispositions are intended to meet the special needs of young persons, to protect society and, where possible, to take into consideration the rights of victims of crime.

In contrast to the Juvenile Delinquents Act, under which dispositions are for an indefinite length of time, the Bill provides that a disposition or combination of dispositions for the same offense would not exceed two years. The maximum within that two year period would be set by the youth court judge. It should also be noted that in no case would a young person be subject to a penalty greater than the maximum penalty applicable to an adult committing the same offense.

The Bill also provides that the youth court could retain jurisdiction over the young person. This is different from the Juvenile Delinquents Act, under which a young person committed to training school, or to the care of a children's aid society, may be dealt with pursuant to provincial legislation.

The Bill provides for two categories of dispositions: non-custody and custody.

Dispositions: Non-Custody

Non-custodial dispositions include a maximum fine of $1,000, compensation not exceeding $1,000, restitution, community service, and probation.

Under the Juvenile Delinquents Act, the range of specific non-custodial dispositions is more limited, there being no explicit provision for compensation, restitution or community service work. However, courts are now making such non-custodial dispositions and probation officers carry responsibility for their enforcement. A more widespread use of such orders will require specific planning for those locations where programs are not now operating.

The Bill provides for the provincial director to delegate responsibility for enforcement of non-custodial dispositions to youth workers. It is anticipated that as is now the case, probation officers would assume responsibility for enforcement and would, in turn, develop or involve various groups and agencies in non-custodial programs. Fines would continue to be paid directly to the court.

Under the Juvenile Delinquents Act, the court may determine where a juvenile may reside as part of the disposition. The court may commit the juvenile to the "care and custody of a probation officer" who may arrange placements; cause the child to be placed in a foster home; or "commit the child to the charge of a children's aid society" who may arrange placements.

Under the proposed Young Offenders Act, the dispositions will change. A child would no longer be placed in the care of a children's aid society, or directly in a foster or group home. However, the court could order the young person to "reside in such place as the provincial director or his delegate may specify". If there were need for intervention by the children's aid society (i.e., the child and family service agency), separate child protection proceedings could be initiated.

Disposition: Custody

The Bill provides that a young person could be committed to secure or open custody for a specific period not exceeding two years, except the period may be three years where (a) the offense, if committed by an adult, could result in life imprisonment or (b) two or more consecutive sentences are involved. An early release from custody may be authorized by the youth court as a result of a review or on a recommendation from the provincial director, which would then result in a probation order for the remainder of the time. When the youth court receives the provincial director's recommendation, and there is no application for a review, the judge may place the young person on probation or, where the court deems it desirable, make no order unless the provincial director requests a review.

At present, whenever a committal to training school is made under the Juvenile Delinquents Act, the young person is dealt with under the provincial Training Schools Act and becomes a ward of the Crown for an unspecified period of time (until age 18 or the wardship is otherwise terminated). Release of the juvenile from the training school is at the discretion of the provincial administation.

Unlike earlier versions, the Bill now provides that when the court commits a young person to custody, it must specify whether the custody is to be open custody or secure custody. Open custody is defined

as "custody in a (a) a community residential centre, group home, child care institution, or forest or wilderness camp, or (b) any other like place or facility designated by the Lieutenant Governor in Council ...". Secure custody is defined as "custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment or restraint of young persons ...". Absence from a place of custody, regardless of the degree of security, would be restricted to day release to attend school or to obtain or continue employment, and to a temporary absence of up to 15 days for medical, compassionate or humanitarian reasons, or for the purpose of rehabilitation or reintegration into the community.

If a young person is fourteen years of age or older, he may be committed to secure custody if (a) the offense is one for which an adult would be liable to imprisonment for five years or more; (b) the offense is prison breach or escape or being at large without excuse or an attempt to commit such offense; or (c) the offense is an indictable offense and the young person (i) within twelve months prior to the offense was convicted of an offense for which an adult would be liable to imprisonment for five years or more or (ii) at any time prior to the commission of the offense was committed to secure custody.

If the young person is under fourteen years of age, he may be committed to secure custody if (a) the offense is one for which an adult would be liable to life imprisonment; (b) the offense is one for which an adult would be liable to imprisonment for five years or more and the young person has a previous record of being convicted of a "five years or more" offense or of being found delinquent under the JDA; or (c) the offense is prison breach or escape or being at large without excuse or an attempt to commit such offense.

Regardless of the age of the young person, "the youth court shall not commit a young person to secure custody unless the court considers a committal to secure custody to be necessary for the protection of society having regard to the seriousness of the offense and the circumstances in which it was committed and having regard to the needs and circumstances of the young person".

It is anticipated that Ontario's designated places of secure custody will include a wide range of facilities which can provide security through either the physical design (e.g., a locked training school) or the control of staff (e.g., certain group homes which have a large number of staff in proportion to the number of residents). This approach would meet the "containment or restraint" requirement of the YOA while allowing the provincial director to respond to the varying needs of young offenders.

Under the YOA, the provincial director would determine the specific place of custody after the youth court had made a custody order. The provincial director would have flexibility in moving offenders from one placement to another, subject to the following limitations:

- an offender could not be moved between levels of custody (i.e., secure and open levels) without the approval of the court; and

- an offender could not be transferred from either level of custody to a non-custodial setting (e.g., parental home) before the full disposition has been served without the approval of the court.

It is important that there be province-wide consistency in decisions relating to initial placement in custody and transfers between placements. In general, there should also be consistency with other placement decisions in the children's services system, such as those described in the earlier chapters on child protection and voluntary access to services. Therefore, it is likely that, subject to the requirement that the placement must adequately protect society, the provincial director would be guided by the following principles:

- the young offender should be placed in the least restrictive alternative, as described in Chapter I, Declaration of Principles;

- the placement should take account of the young offender's cultural background;

- the wishes of the young offender and his parents and the needs of the offender should be considered.

Offenders and their parents would be advised of the availability of a complaints procedure (see Chapter 6) for airing complaints related to placement.

Under the proposed Secure Services Act, all offenders in custody (i.e., secure and open custody) would be reviewed periodically by the Custody Review Board (presently known as the Training Schools Advisory Board). In addition to regular reviews of documentation (e.g., progress reports from superintendents of secure custody facilities), consideration is being given to providing that offenders in secure custody would be entitled to a full hearing with legal representation before the Board every six months on the issue of release from the secure level of custody. As well, all offenders in custody would be entitled to appear before the Board to air complaints regarding their placement or program. Thus, the Board would act as the external complaints officer for the purposes of the complaints procedure described in Chapter 6.

In brief, the Board would, depending on the circumstances, be able to recommend to the provincial director that:

(a) an offender be transferred to another placement within the same level of custody;

(b) changes be made in the program or placement of an offender in order to respond to well-founded complaints by the offender or his parents;

(c) application be made to the youth court requesting that an offender be transferred between the secure and non-secure levels of custody;

(d) application be made to the youth court requesting that an offender be released from custody and placed on probation, as provided in the YOA.

Status of offenders in custody

Under both the JDA and the YOA, the province would decide the legal guardianship of offenders in custody. Ontario's Training Schools Act currently provides that all juveniles under that Act become Crown wards until age 18 unless wardship is terminated earlier. During this period, the rights and responsibilities of the parents with respect to their child are suspended. Under the proposed Secure Services Act, wardship would be abolished as an unjustified and excessive intervention in the parent-child relationship. Instead, only those rights and responsibilities necessary to the day-to-day care and programming for the child would transfer to the Ministry. All other rights and responsibilities would remain with the parents or substitute parents (e.g., a child and family service agency with wardship of the child). The situation would be similar to voluntary residential placements in which a parent places his child for a temporary period without giving up his role as guardian of the child. For example, parents would continue to be responsible for medical decisions (except in emergencies, where consent is not required) and would have the same right of access to records as any other parent or guardian of a child in the children's services system. In addition, parents would have a right to be consulted regarding the plan of care and any proposed changes in the plan (currently required under the residential standards). If parents were not willing to carry out parental duties while the young person was in custody, they could delegate their rights and responsibilities to a willing adult (e.g., a relative) or the court could appoint some other adult to act as the temporary guardian of the young person during the period of custody. In extreme cases, child protection proceedings could be initiated.

Review of custody dispositions

The YOA provides for periodic court reviews to ensure that custody dispositions are monitored. The provincial director would have to initiate a review not later than one year after the disposition was made. In addition, the provincial director, prosecutor, young person or his parent could initiate a review six months after the order or the most recent review. A review could also be initiated within the first six months of the disposition if leave of the court is obtained.

At the review hearing, the court could confirm the original dispostion or could release the young person from custody and place him on probation for a period not exceeding the remainder of the custody period.

The YOA gives the province the option of appointing a review board to carry out the review functions of the youth court. The decision of the review board would be subject to review by the youth court on the application of the offender, his parents, the Attorney General or the provincial director. In Ontario it is anticipated that the youth court, rather than a review board, would conduct the reviews of custody dispositions. The court would be conducting non-custody reviews and it seems appropriate that it should also deal with the more serious question of whether a young person should be released from custody. The use of the youth court would avoid the establishment of a parallel review system, which has the potential of considerable duplication if a large number of cases reviewed by review boards were re-reviewed by the court.

Thus, under the proposed review process, the court would review the basic question of whether a young person should remain in custody and the level of custody (i.e., secure or open). The Custody Review Board, as discussed earlier, would review the appropriateness of specific places of custody.

6.

Rights and responsibilities of children in care

A. Fundamental rights

Throughout this paper, there are various proposals and principles to protect the rights of children. The Declaration of Principles, for example, includes several which would apply to all children receiving service, such as the right to be given an opportunity to be heard and the right to the least restrictive alternative appropriate to the circumstances. In addition to specific provisions proposed to reflect these principles, a number of other procedural safeguards have been introduced to protect the rights and interests of children (e.g., limits on the use of intrusive procedures).

Although many of the provisions would apply to all children, it is important to articulate in the legislation the specific rights of children in residential care. These children are generally more vulnerable than those living with their parents. As noted in the discussion paper, *Child Advocacy: Implementing the Child's Rights to be Heard*, we should be particularly sensitive to the voice of the child in care, for whom we have a collective responsibility.

Second, the placement of a child in residential care is a serious decision with a potentially major impact upon the child, regardless of whether the placement is with the consent of the parent or as a result of a court order. The seriousness of the decision is reflected in our earlier proposals regarding pre- and post-admission review by the placement review body. As mentioned previously, the effects of removing the child from his home include separation from his family, friends and neighbourhood; feelings of loss, abandonment and resentment; and possible re-integration problems with respect to schooling and social relationships. Also, the child's liberty is often very much affected by new limits usually placed on where he may go, on those with whom he is allowed to associate and on when he is permitted to be away from the residence.

The Ministry's recognition of its special responsibility for ensuring that children placed in residential care receive an acceptable level of care is currently reflected in The Children's Residential Services Act and the regulations, standards under the Act, which establish a basic framework for monitoring the hundreds of licensed and Ministry-run residences providing care for three or more unrelated children. The Children's Residential Services Act licensing provisions will be incorporated in The Children's Act and the residential standards will be continued as regulations under the new Act.

The proposals in this section build on this existing legislative framework. ***We are recommending*** that certain fundamental rights of children in care be specified in The Children's Act and protected by a

strong enforcement mechanism. We realize that many of these rights are recognized to a large extent in The Children's Residential Services Act regulations and are generally accepted by residential care providers. However, unlike most of the residential standards, the rights listed below are so fundamental they would be more appropriately placed in the Act. The statutory declaration of these rights will make them more public and will highlight their importance and the Ministry's commitment to them.

We are recommending that the following rights be included in the Act:

1. The right to communicate.

- the right to regular visitation and communication with family, unless prohibited by court order;

- the right to communicate in private with legal aid, a lawyer or other advocate of the child's choice;

- the right to send and receive unread and uncensored correspondence. (In the child's presence, the staff could inspect incoming mail for the sole purpose of detecting and confiscating contraband.)

2. The right to privacy and individualization.

- the right to a reasonable degree of privacy and personal ownership of possessions;

- the right to the development and implementation of an individualized plan of care within thirty days of admission.

3. The right to be free from corporal punishment.

4. The right to a reasonable opportunity to participate or refuse to participate in religious activities.

5. The right to adequate care and services.

- the right to adequate food and appropriate clothing;

- the right to adequate medical and dental care delivered in a community setting wherever possible;

- the right to an adequate educational program which uses community programs and facilities wherever possible;

- the right to adequate exercise and recreational activities which make use of community resources wherever possible.

6. The right to be consulted or heard when major decisions affecting the child are being made.

7. The right to be informed of rights and responsibilities.

- the right to receive a written statement as well as a verbal explanation of the rules, disciplinary measures and complaints procedure of the residence;

- the right to have access to an appropriate complaints procedure.

If a child, parent or other advocate felt that one of these rights had been violated, ***we are recommending*** the following enforcement mechanism be used. First, there would have to be access to an internal complaints procedure (sometimes called an "advocacy" procedure in existing Ministry programs). For example, this could take the form of routine "house" meetings or discussion periods or a meeting with the prime worker. If necessary, there should be access to the program director. If the matter could not be resolved at the internal level, the complaint could be brought before an external, impartial person designated as a complaints officer by the Ministry. This person would act as a mediator or ombudsman attempting to reach a resolution satisfactory to the parties.

Other options would be to have an internal procedure only or to have the residence appoint the outside complaints officer. However, the concern is that both of these approaches might not be seen by children, parents or other advocates as providing a sufficiently neutral person to hear complaints.

A recent study of existing advocacy procedures in Ministry-run residences concluded that such procedures had a generally positive impact on the programs. However, since none of the residences had actually referred a complaint to an outside third party, the merit of any external complaints officer could not be evaluated. It was recommended that the Ministry undertake further study of the effectiveness of using an external third party, such as a complaints officer. We are particularly interested in hearing from readers on this issue.

It is expected that most issues would be resolved internally or by the officer. However, if the complaints officer found the residence had committed:

(a) a major violation of a child's right (e.g., deprived him of food for long periods of time; inflicted physical harm); or

(b) persistent or widespread violations (not necessarily major violations) of children's rights (e.g., preventing all residents from visiting with their families, even though not prohibited by court order; not allowing children to engage in any recreational activities; regular censorship of mail);

he would be required to report it to the Ministry, who would have a duty to investigate the matter, and make a recommendation regarding the action to be taken. These recommendations could relate to the protection of an individual child or to the residence as a whole, including:

(a) ordering the residence to change its practice to comply with the rights;

(b) ensuring that the person responsible was disciplined;

(c) transferring the child to another residence;

(d) providing the residence with additional funds or staff to enable the residence to comply with the rights;

(e) replacing the license of the residence with a probationary license pending compliance with the rights;

(f) withdrawing the license; or

(g) taking any other appropriate action.

If the Ministry decided to withdraw the license or to put the residence on probationary status, the residence would be able to appeal the decision to the Children's Residential Services Review Board (as now provided in The Children's Residential Services Act).

It can be argued that, at some point in the process, the child, parent or other advocate should have access to a court. However, courts are backlogged, slow to respond and tend to be time-consuming for everyone involved. In addition, it is questionable whether courts should be involved in making detailed orders regarding programs and licensing. On the other hand, even if a court were not permitted to make specific programming and licensing orders, the declaration of a court that a right had been violated could carry considerable weight. It is worth noting that the British Columbia Royal Commission on Family and Children's Law (1975) recommended that judicial declarations be used to remedy violations of children's rights. In any event, access to a court would be available. The intention behind the proposed complaints procedure is not to remove a child's right to sue in a civil court if he has suffered damages or to lay a charge if he has been the victim of a crime. It should also be noted that the internal complaints

procedure described above would be available to children, parents and other advocates for any other type of complaint they might have about a residential facility (e.g., a violation of a residential standard). However, access to the external complaints officer would be an option only if a fundamental right had been violated.

B. Responsibilities

Few people would disagree that rights generally also entail responsibilities. The inclusion of the above list of rights clearly does not suggest that children in residential care should be free of obligations. In fact, in many cases, the responsibilities of children in residential programs are greater than those of children living at home. Needless to say, in both situations the age of the child is an important factor in determining the appropriateness of specific responsibilities. In addition to the obligations of all children, such as the duty to attend school and to submit to the disciplinary rules of teachers and other adults, children in residential care have a responsibility to participate in the residence's program and to make the adjustment to a new living situation.

The legislation should probably clarify what is expected of children in residential care. Specifically, ***we are recommending*** that the following responsibilities be included in the Act:

1. Respect for the privacy and personal possessions of other residents and staff.

2. Participation in the development and implementation of the plan of care.

3. Adherence to house rules.

4. Absence of behaviour that damages property or causes injury to other residents and staff.

It is not necessary for the legislation to specify an enforcement mechanism, since the usual means are available to all residences. These include: normal in-house disciplinary measures; calling the parents or the referring agency; or, as last resorts, ejection from the program or return to court. We feel there is some value in listing the responsibilities in the legislation and having children receive a copy of the list along with the statement of rules and disciplinary measures mentioned earlier.

7.

Extraordinary measures

Extraordinary measures

This part of the legislation would deal with three types of extreme measures entailing certain risks to the child: (a) intrusive procedures, (b) secure isolation, and (c) secure treatment. Although these measures are clearly intended to help the child, they may be harmful if not carefully controlled and used only as a last resort. The proposals regarding secure treatment and secure isolation have already been debated and accepted as part of the Ministry's secure services policy. As mentioned below, the proposals for limiting the use of intrusive procedures are largely derived from current practice and Ministry policy.

A. Limits on intrusive procedures

As a result of experiences in other jurisdictions, there is a growing recognition that limits should be placed on some of the more intensive, harsh or aversive treatment procedures used with children. The Ministry's *Standards for Use of Behavioural Procedures in Facilities for the Mentally Retarded* have attempted to standardize the manner in which behavioural modification and related behavioural procedures are used in mental retardation facilities, and to minimize the potential for incorrect or inappropriate use of behavioural programming techniques. It should be noted that these standards are currently being revised. As well, regulations under The Children's Residential Services Act prohibit the use of "harsh or degrading" measures, corporal punishment, or the deprivation of basic needs. The proposed Secure Services Act limits the use of locked isolation rooms and establishes stringent procedural safeguards and criteria to govern the admission of children to secure treatment units. In addition, the Ontario Interministerial Committee on Medical Consent and the Law Reform Commission of Canada have recently concluded that certain procedures (e.g., sterilization) are of such a serious nature that procedural safeguards are necessary to protect the rights of children.

Undoubtedly, in practice most professionals are very cautious about the use of intrusive procedures and most programs have some internal review mechanism to check and monitor their use. The recommendations following, build on this good practice and on existing Ministry policies. The goals are to ensure that intrusive procedures are used only when absolutely necessary and that similar criteria and safeguards apply throughout the province.

Classification

One of the most difficult problems is defining "intrusive procedure". ***We are recommending*** that the Ministry designate certain procedures as "prohibited" and others as "regulated".

Prohibited intrusive procedures
These treatment strategies are so highly intrusive, irreversible in their effects, or subject the child to such great risk, they should not be permitted in Ministry programs. These would include non-therapeutic sterilization, non-therapeutic experimentation (e.g., medical or chemical experimentation), psychosurgery for behavioural control, electroconvulsive therapy (ECT), denial or substantial deprivation of vital necessities (e.g., food, shelter, clothing) and any other procedure designated by the Ministry (e.g., certain restraint mechanisms).

Regulated intrusive procedures
These would be permitted, subject to the requirements regarding consent, approval, and review discussed below. They would include:

- aversive stimulation procedures involving the application of painful or noxious stimuli, including but not limited to a strongly unpleasant tasting product or the unconventional use of food (e.g., hot pepper sauce applied to clothing to discourage chewing) or application of unpleasant physical stimulation or sensations (e.g., administering electric shock to the arm or leg).

- the use of drugs for behaviour control.

- the use of mechanical restraints.

- any other procedure designated by the Ministry.

Program approval by the Ministry

We are recommending that the intrusive procedures fall within the residential standards relating to "harsh or degrading" measures. Thus, Ministry approval would be required before agencies would be permitted to establish programs using intrusive procedures.

Review

The present *Standards for the Use of Behavioural Procedures in Facilities for the Mentally Retarded* require each facility to establish its own interdisciplinary team to review aversive stimulation programs for individual children. ***We are recommending*** that similar review

bodies or teams be established in all residential and non-residential programs which involve the use of intrusive procedures. In addition, their membership should include people from outside the program, probably appointed by the Ministry.

The use of any intrusive procedure as part of an individual child's treatment program would have to be approved by this review body. Approval would not be granted unless the following criteria were met:

(a) the parent or legal guardian of the child (e.g., an agency with guardianship authority) consented to the proposed intrusive procedure;

(b) the child's behaviour was serious enough to warrant such extreme intervention;

(c) less intrusive alternatives had been tried but had not satisfactorily reduced the behaviour;

(d) no other less intrusive alternatives were feasible;

(e) there was some reasonable basis for believing that the proposed procedure would satisfactorily reduce the behaviour.

Clearly, in emergency situations, the procedure could be used without prior approval. Approval would, however, have to be sought within 48 hours. The views and preferences of the child, if they could be reasonably ascertained, would also have to be considered by the review body.

The use of an approved intrusive procedure would be subject to further review after two months. The review body would also be required to submit a report on a regular basis (e.g., semi-annually or annually) summarizing its decisions during the period covered by the report. It may also be advisable to require facilities using intrusive procedures to establish an external advisory board to review periodically the decisions of the internal review body. Such an advisory board has been established by at least one institution serving mentally retarded people. Another option would be to create a province-wide external review body of experts to review periodically the decisions of the internal bodies.

Some commentators argue that a completely external review process would be a more effective check on a program's practices with respect to intrusive procedures. This may be true but it would probably also

be slower, more costly and cumbersome than the review process proposed above. The proposed process has significant external aspects: external representation on the review body (we have not yet attempted to specify what percentage of the membership should be external); the possibility of external advisory boards; and periodic reports to the Ministry.

B. Secure isolation

The use of secure (i.e., locked) isolation rooms in a residential or non-residential program is covered by the proposed Secure Services Act, which requires that the existence of such rooms be authorized by the Ministry.

Secure isolation is designed to provide a temporary means of confining children who occasionally become aggressive or violent, but who normally do not require confinement. To ensure that secure isolation is the least restrictive way of dealing with a situation, strict criteria and procedures have been developed. The admission criteria are:

(a) the child had committed an act that caused or created the imminent risk of causing serious bodily harm to others or an act that caused serious property damage;

(b) the child continued to behave in a manner which created the imminent risk of causing such harm or damage;

(c) no less restrictive alternative was feasible.

The maximum period of secure isolation within a twenty-four hour period is twelve hours and the maximum within a seven-day period is thirty-six. The decision to place a child in secure isolation must be approved by the director of the facility or his delegate and a designated unlocked room must be available as a less restrictive alternative. If the child is to remain in secure isolation for a continuous period of more than three hours, approval must be given by the director, rather than by a delegate. The director must also submit to the Ministry periodic reports on how often secure isolation was used and the reasons for not using less restrictive alternatives. It is intended that most stays will be substantially less than the maximum allowed. The other procedures described above were designed to encourage the use of secure isolation for minimum periods of time.

C. Secure treatment

As noted earlier, the proposed Secure Services Act includes provisions regarding the use of secure treatment units (i.e., small, lockable units in psychiatric facilities for those children who have a mental or emotional disorder and who are dangerous to themselves or others). The legislation will specify the conditions under which children may be confined in secure treatment units by means of locked doors and similar controls. Only those units or facilities designated as "secure treatment" would be allowed to lock up children in order to provide treatment. Because of the risks to the child associated with confinement in a secure facility, there was felt to be a need to introduce procedures to ensure that only those children requiring secure programs were placed in them. The key legislative elements of the proposed secure treatment provisions can be summarized as follows:

Admission criteria

(a) the child would be between 12 and 17 years of age (younger children could be admitted with the consent of the Minister);

(b) the child had been diagnosed as having a mental or emotional disorder;

(c) the child had committed an act which caused, or created the imminent risk of causing serious bodily harm to himself or others within the forty-five days preceding the application for admission;

(d) the child had a history of committing other such acts during the preceding twelve months. (The exception is for the child who caused or attempted to cause the death of another person.);

(e) the child required treatment in order to prevent a recurrence of the harmful behaviour;

(f) the specific treatment needed was available at the unit to which he was proposed for admission;

(g) there was a finding that no less restrictive form of treatment would be appropriate.

Procedure

Under the proposed Secure Services Act, a child's parents or guardians may apply to Family Court to have the child admitted to secure treatment. A hearing would be held to determine whether the child should be admitted. It would be presumed that unless a less restrictive method of treatment had been tried and had not been effective, a less restrictive method should be used. However, if the admission criteria were met, the court could order the child admitted to secure treatment for a period not exceeding 120 days. The order would include a statement of the reasons for the decision to admit, including a description of the plan, where available, for the non-secure placement of the child after his release from secure treatment. It should be noted that the child would have legal representation at the hearing.

Review

If the parents or guardians felt the child needed to remain in secure treatment for longer than 120 days, they may apply to the court for an extension of the commitment period. A person providing care for the child and applying with the parents' consent could also apply for an additional commitment period. The court could grant an extension of up to ninety days if it were satisfied that:

(a) the original admission criteria still applied (with the exception of (c) and (d) above);

(b) the treatment needed by the child was being provided.

Emergency admission

The proposed Act recognizes that there may be emergency situations that require a child be admitted immediately. The director of a secure treatment unit would be able to admit a child on an emergency basis, if there were reasonable grounds for believing the admission criteria were being met. Similarly, a person who had apprehended a child under the present Child Welfare Act could apply for a child's emergency admission. However, in both cases, a court hearing would have to be held within five days of the emergency admission. Unless the director found that the reason for the emergency admission no longer existed, a child would normally remain in secure treatment until the application is disposed of.

8.

Adoption and foster guardianship

We can assume that there will always be children who cannot grow up in the families into which they were born. Even though greater efforts are being made to help families stay together, there will always be parents who are unwilling or unable to provide a home for their children. As always, permanent families must be found for these children. The proposals that follow are based on the belief that there should be a variety of ways of ensuring permanence for a child. In order to allow the service system to respond more flexibly and realistically to a child's need for stability, the law should recognize the existence of a broader range of both children who need substitute parents and adults who are willing to offer a child a permanent home.

This part of the legislation would cover the two major routes to permanence for children who cannot be raised by their biological parents: adoption and foster guardianship. The adoption portion would essentially encompass the provisions presently contained in Part III of The Child Welfare Act pertaining to public (i.e., CAS) adoptions. Specifically, proposals are made for those areas not addressed by the 1978 amendments to the Act. It should be noted that private adoption is discussed separately at the end of the adoption section of this chapter.

The legislation would also introduce the concept of foster guardianship as an alternative to adoption for certain children who require substitute families. The notion of vesting guardianship in long-term foster parents originated in the United States in response to those serious shortcomings in their child protection system that made it extremely difficult to terminate parental rights. Though Ontario does not have the same legal obstacles to freeing a child for adoption, foster guardianship is still a realistic and attractive alternative to adoption under the circumstances described later.

A. Adoption

The last decade has witnessed several trends that suggest current adoption legislation may not be able to meet the needs of many children seeking permanence. With the rapid increase in the number of children remaining with their unmarried mothers, adoption agencies no longer have infants for couples in search of a child. The majority of children available for adoption now emerge from the child protection stream. As a result, there is now a wider range of children asking for the stability and permanence adoption traditionally afforded – children well out of infancy bringing with them knowledge of their origins, memories of their past, and often an existing relationship with members of their biological families. In addition, many children looking for adoptive homes are considered "hard-to-place" because they are handicapped, emotionally disturbed, or members of a sibling group that should not be separated.

In general, the changes introduced would be minor, since adoption is another area where the law should be kept to a minimum. The real effort to ensure the success of an adoption placement goes on largely outside the court room and does not require extensive legal provisions. For example, the agency's role in matching the child and adoptive parents calls for sensitivity and knowledge on the part of workers, rather than detailed legal directives. Another example is the creation of the subsidized adoption program which has been, and will continue to be, an effective response to the needs of hard-to-place children. The role of legislation here is merely to grant the Minister the legal authority to approve payments.

Under present legislation, there are two ways for a child to be freed for adoption: after the termination of parental rights in a child protection proceeding or with the consent of the parents. These routes will continue to exist and specific aspects of the adoption process will be clarified. As in other areas of this paper, the focus of this section is on key elements in the decision-making process, such as the validity of consents and the criteria for making an adoption order. Although the proposed changes are not dramatic, they would contribute to greater legislative clarity and responsiveness in meeting the needs of children.

Criteria for making an adoption order

Present adoption legislation requires the court to satisfy itself that adoption is in the child's "best interests". However, the criteria listed in The Child Welfare Act are broad and general and do not necessarily address themselves to the considerations specific to adoption. Furthermore, as stated later, the best interests factors invite a comparison between the child's future in an adoptive home and his biological family's ability to care for him (e.g., by considering the merits of a proposed plan in contrast with the merits of returning the child to his parents). Such a comparison is irrelevant and counter-productive since the parents have already either consented to the child's adoption or had their rights terminated, thus freeing the child for adoption. In order to focus the determination of an adoption application on the best interests of the child, it is necessary to narrow the existing criteria to those most relevant to the adoption process. A limited best interests test could be derived from the present list of criteria.

We are recommending that in order to determine that the adoption is in the best interests of the child, the court must conclude that:

- the physical and emotional well-being of the child will be promoted;

- the prospective adoptive parents have demonstrated an understanding and appreciation of their role as parents of a child not born to them.

Another important consideration should be whether the child wishes to be adopted. At present, the consent of children seven years of age and over is required for adoption. It can, however, be dispensed with if the court is satisfied that the child's consent "would not be appropriate". Rather than having a "requirement" which can be so easily and subjectively dispensed with, ***we are recommending*** that the consent of the child twelve years and over be required for an adoption order and that the views of the child under twelve, if ascertainable, be taken into consideration. Children under twelve should, as a matter of agency policy, participate in the adoption decision. Accordingly, there would be no provisions for dispensing with the older child's consent, although children under twelve could be adopted without their consent. It should be noted that, in practice, children over five are rarely placed in adoptive homes against their will, since experience has shown that such placements are likely not to succeed if the child resists.

It has been pointed out that there are situations that may justify dispensing with the older child's consent. For example, a child placed with a family in infancy or early childhood may not know that the people caring for him are not his biological parents. If they later wish to adopt the child, they may not want to upset him by asking him to consent to the adoption and thereby divulging that they are not his parents. It could be argued that requiring the child's consent in such situations would be emotionally injurious to the child and that his consent should, therefore, be dispensed with. An alternative to the above proposal would be to provide for dispensing with the child's consent if it could be shown that being asked to consent would be emotionally injurious to the child. However, the concept of emotional injury is subjective and, therefore, may be open to abuse. It may not be possible to ascertain whether being asked to consent would, in fact, be emotionally injurious to the child without at least talking to him; yet this would not be desirable under the circumstances described above. It might be better for the prospective adoptive parents to delay their application and spend time preparing the child for the prospect of adoption. However, if there were provisions for dispensing with the child's consent based on the likelihood of emotional injury, they should be restrictive and should incorporate safeguards for the child (e.g., an advocate who would investigate the matter from the child's perspective). Even though we have not recommended that there be provisions for dispensing with the child's consent, we realize there are arguments in favour of this approach and would thus welcome readers' suggestions and comments.

A final issue relates to the foster parents' opportunity to adopt the child for whom they have been caring. At present, foster parents are generally informed that an adoptive home is being sought and are invited to apply to adopt the child. It is worth noting, however, that some jurisdictions either by legislation or policy, give preference to foster parents to adopt a child who has been in their care for a certain period. Such an approach serves two purposes: it promotes continuity for the child and it acknowledges that foster parents should have certain rights vis-a-vis the child in their care. In view of these considerations, ***we are recommending*** that where the child has been in the foster parents' care for a continuous period of six months or more, it be presumed to be in the child's best interests for foster parents to be given preference in adopting the child. This means that, at the very least, a home study would have to be conducted and the foster parents' application would have to be considered.

Since the legislation would merely be stating a presumption in favour of the foster parents, their application to adopt could be turned down by the agency on the same basis as that of other adoptive applicants. To ensure that foster parents are, in fact, given preference, ***we are recommending*** that the foster parents be allowed to appeal to the Director of Child Welfare the decision to reject their application to adopt. We recognize that this goes beyond the rights now granted to other adoptive applicants. However, this additional procedural right merely recognizes that the foster parents occupy a special place in the life of the child, one not shared by other prospective adoptive parents. Even now, the legislation grants certain rights to foster parents, such as the right to notice and legal standing in child protection proceedings. Finally, to ensure that the foster parents are made aware of an intended adoptive placement, ***we are recommending*** that the agency be required to give the foster parents who have been caring for a child for a continuous period of six months or more notice that an adoptive home is being sought.

Single, separated, divorced or widowed applicants

At present, persons who are single, separated, divorced or widowed cannot become adoptive parents unless the court is satisfied that there are "special circumstances" justifying the adoption order. It is important to recognize that Ontario's adoption law originated at a time when single parenthood was considered an unusual and unacceptable style of life. The lawful marriage of two adults was presumed to be a key to stability for a child introduced into a family either by birth or by adoption. However, it can be argued that many children growing up in single-parent families fare as well as those from two-parent families.

Although the two-parent family will probably continue to be the optimal placement for most children, careful consideration should be given to the best interests of the child whose adoption is at issue. Therefore, in order to increase the flexibility and responsiveness of the adoption system, one option would be to base the choice of adoptive parent on the needs of the particular child and to eliminate the statutory discrimination that exists against certain applicants. In other words, applicants who are single, separated, divorced or widowed should not have to prove the existence of special circumstances in order to be considered prospective adoptive parents.

Another option would be to define in law the circumstances that would allow single, separated, divorced or widowed applicants to adopt. In this way, subjectivity would be reduced, and the preference for two-parent families maintained. Even though single parenthood is becoming more common and accepted, it can be argued that most people prefer to see children grow up in two-parent families. Thus, the legislation should perhaps reflect this view by retaining, but clearly defining, the "special circumstances" requirement. For example, the criteria could include the following: the unavailability of a suitable two-parent family or the existence of a close relationship with the applicant. However, in view of both our desire to promote the flexibility and responsiveness of the adoption system and the proposed amendments to the Human Rights Code, which include marital status as a prohibited ground for discrimination, ***we are recommending*** that single, separated, divorced or widowed persons be permitted to adopt a child, without the necessity of showing special circumstances.

Another issue relates to the eligibility of common law couples to adopt a child jointly. Under present child welfare legislation, common-law couples can apply to adopt only as single people. The Family Law Reform Act, however, grants legal recognition to common-law unions of five years or more (e.g., with respect to support). Since adoption legislation should probably coincide with other legislative trends, ***we are recommending*** that partners in a common law union of five years or more be permitted to apply jointly to adopt a child.

Ensuring a valid consent

Although the consent route generally contributes to a smoothly running adoption process, particularly for infants, a number of placements have been seriously threatened in the past couple of years because the signed consent turned out to be no guarantee that the parent either understood its implications or acted voluntarily. It is crucial to the security of the child's adoption placement that the biological parent realize the finality of the adoption process. A change of heart after the child is in his adoptive home jeopardizes the chances

for attachment to the adoptive applicants and may throw the child and adoptive parents into an emotional and legal limbo for months, and sometimes years, while the competing adults' interests are reconciled. Although much has already been done under present legislation to ensure that a parent surrenders a child for adoption voluntarily and with full awareness of the implications, a further step should be taken to reflect the present practice of most agencies.

We are recommending that the agency be required to inform the parent(s) of their opportunity to receive counselling and independent legal advice prior to surrendering a child for adoption. Although this generally occurs at present, such a requirement does not exist in the legislation.

Another option would be to *require* the parent to receive counselling and independent legal advice prior to signing a consent form. Unfortunately, while this approach would help to ensure that the requirements for a valid consent had been met, it would also result in needless intrusion and expense for parents who were, in fact, acting in an informed and voluntary manner. It would be less paternalistic to require the agency to *inform* the parents of the opportunity to receive counselling and legal advice and to allow the parents to decide for themselves whether to take advantage of the opportunity. It should probably be assumed that the parents are in the best position to know whether they need further assistance. Presumably, ambivalent or ill-informed parents would welcome the chance to receive counselling or legal advice. It should be noted that, for young persons under the age of eighteen, the Official Guardian would, as now, have to confirm in writing that the person understands the implications of giving consent.

Finally, since we have proposed that the older child's consent be required, ***we are also recommending*** that the child twelve and over be required to receive independent counselling and legal advice prior to consenting to adoption.

Dispensing with parental consent

As mentioned, children may now be placed for adoption with the consent of their parents. However, the legislation also allows the court to dispense with parental consent to adoption if the judge is satisfied "that it is in the best interests of the child that the requirement be dispensed with". Unfortunately, The Child Welfare Act does not define those circumstances in which a "best interests" determination should be invoked to supercede the rights of the biological parents. Because of the finality of the adoption order, judges are reluctant to apply the "best interests" test without also considering the right of the parent(s)

to withhold consent. As a result, the decision to dispense with consent is generally made on the basis of a variety of sometimes conflicting factors, including the desire of the parent whose consent is at issue to participate in the child's growth and development.

It has already been proposed that the present "best interests" criteria be limited to a set of considerations specific to adoption. However, even a restricted best interests test may not adequately structure judicial discretion to dispense with consent. Several jurisdictions have thus introduced additional considerations, such as the length of time the biological parent has been out of the child's life and the "reasonableness" of the parent's refusal to consent. While there is some merit in the first criterion, the second is fraught with difficulties, since what is "reasonable" is open to varying judicial interpretations.

We are recommending that parental consent to adoption be dispensed with only if the person demonstrates an intent to forego his parental or custodial rights or obligations, and that the following be presumed to constitute evidence of such an intent:

- a failure to communicate with or visit the child or the child's custodian for a period of one year; or

- in the case of a newborn, a failure to communicate with or visit the child's mother for a period of six months, either immediately before or after the child's birth.

Since the evidence for intent to forego parental rights would be merely presumptive, the parent could argue that he had unsuccessfully attempted to communicate with the child or explain why communication had not been possible. In any event, the person would receive notice of the court's intention to dispense with his consent and could, if he wished, attempt to rebut the presumption.

Post-adoptive access

Under present adoption legislation, the biological family has no right of access once the child is adopted, even if an access order existed prior to adoption. Since an agency may not place a child in an adoptive home while an access order is in effect, any outstanding order has to be terminated prior to an adoptive placement. Whether to grant access after adoption has become a controversial issue in adoption literature. Those in favour argue that a child's sense of attachment to his past may be as important as the feeling of permanence that comes with adoption. Furthermore, many children today, because of their age at adoption, enter the adoptive relationship with close emotional ties to members of their biological families. Particularly in situations

where contact between the child and his family has, prior to adoption, been legally sanctioned (through the granting of an access order), it is argued, that post-adoptive access appears to offer a reasonable way for the relationship to continue.

On the other side, it is pointed out that post-adoptive access may jeopardize the stability of the adoptive relationship. Continued contact with the biological family could be disruptive to the child and threatening to the adoptive parents. It is also argued that, in situations where the adoptive parents are amenable to continued contact between the child and members of his biological family, a court order granting access would not be required, since an informal arrangement could be worked out. In contrast, it is likely that an access order without the adoptive parents' consent would result in stress and disruption and may, in fact, endanger the adoptive relationship.

We are recommending that the legislation not permit the court to grant members of the biological family access to the child after adoption. However, as already mentioned, post-adoptive access would still be a possibility if the child and the biological family, as well as the adoptive parents, agreed to it. It is felt that a court order would be unnecessary in those situations where everyone agreed, and potentially disruptive and threatening in situations where there was disagreement. Furthermore, with the introduction of clearer criteria for finding a child to be in need of protection and the expansion of parental opportunities for seeking post-court reviews, the rights of the biological parents would probably be adequately protected. Finally, as discussed later, access would be allowed under the foster guardianship provisions.

A situation that warrants special mention is that of step-parent adoptions. At present, a biological parent who has consented to his child's adoption by an ex-spouse's new husband or wife has no right of access after the adoption order has been made. Understandably, a parent may be reluctant to consent to the adoption in the first place. In some ways, this situation is more like a custody or access dispute in divorce proceedings than an adoption matter. Nevertheless, the above recommendation, if accepted, would still apply. Even though the Family Law Reform Act permits "any person" to apply for an order allowing access to a child, the Ontario Court of Appeal recently ruled that biological parents may not seek access to their adopted children. It was argued that the adoption order creates a "new family unit" that should be protected from interference. This precedent-setting judgement would, of course, make it impossible for any biological parent to seek legal access to his adopted child, including children adopted by step-parents.

It should be noted that a number of commentators have begun to question the appropriateness and desirability of step-parent adoptions. They argue that adoption by a step-parent cuts a child off, not only from his biological parent, but from an entire half of his family, therefore wiping out kinship links with brothers, cousins and grandparents. Some form of custody or guardianship by the step-parent is proposed as a preferable way of ensuring security and continuity for the child. A 1972 British report recommended that rights, short of adoption, be conferred on a step-parent but that ties with the biological parent not be extinguished.

Even though we have recommended that adoption legislation not provide for post-adoptive access, we recognize there are strong arguments on both sides. We would especially welcome your comments on this issue and on the question of whether step-parents should assume custody or guardianship, rather than parental rights through an adoption order.

The effect of an adoption order

Under present legislation, a child becomes the child of the adoptive parents on the date of the adoption order. This is to ensure that the child acquires the legal rights of a naturally born child and that the prior legal relationship with the biological parents ends. Unfortunately, the present "as-if-born-to" phraseology may take on greater psychological and social implications than intended, especially for older children who enter adoptive relationships with memories of their past lives.

We are recommending that the "as-if-born-to" concept be replaced by a statement of the legal relationship between the adoptive parents and child, specifying that the adoptive parents have the rights and responsibilities of biological parents.

Also, ***we are recommending*** that the parents be informed of their right to know whether their child has been adopted.

Status to give consent

The present legislation is confusing in the way it identifies those persons whose consents are required for a child's adoption (see s. 69 (1) of The Child Welfare Act). ***We are recommending*** that the definition of "parent" be repealed and replaced by the following list of persons whose consents would be required:

- the biological mother of the child; and

- the biological father of the child; and

- any person who was residing with the child and the child's custodial parent at the time the child was released for adoption and who demonstrated a settled intention to treat the child as a child of the person's family;

- the spouse of the adoptive applicant, if the prospective adopters were not making application jointly.

Circumstances requiring a formal hearing

Present adoption legislation requires that an adoption application be "heard" but is unclear as to whether a formal hearing must be held. Since, in almost all instances, the application is unopposed, many judges review the documentation in their chambers and reserve formal hearings for contested or otherwise problematic situations. To encourage consistency, the legislation should probably specify the circumstances under which a hearing must be held. ***We are recommending*** that the court be permitted to determine an adoption application on the basis of review of written documentation placed before it, but that a formal hearing be required in the following circumstances:

- if the application were opposed;

- if issues were raised regarding consents;

- if, in the court's opinion, the child should be heard on the issue of capacity to appreciate the nature of the application;

- if the parties wished a formal hearing;

- in any other situation the court felt it required a formal hearing.

Private adoptions

At present, children may be placed in adoptive homes either by a children's aid society or by a private organization or individual licensed by the Director of Child Welfare to perform this function. Through the licensing agreement and the home study requirement, the government seeks to exercise control over the process to ensure that the child is protected. However, since private adoption was

developed to circumvent the publicly supported adoption system, it is sometimes criticized for being a service primarily for prospective applicants in search of an infant. Some critics argue that private adoption does not provide adequate safeguards for the child and the relinquishing parents.

Despite previous legislative attempts to regulate private adoptions, several issues remain, such as the problems of enforcing existing regulations and the inadequacy of protections for the biological parents. Even though further policy work in the area of private adoptions is now being undertaken by the Ministry, it would be useful to address some of the issues in a legislative context.

At present, a child may not be privately placed with a family for the purpose of adoption until a home study has been conducted and a licence issued. However, biological parents who have made no arrangements for adoption do at times place the infant without a home study. Later, by the time a licence and a home study are requested, bonding may already have occurred between the child and the people caring for him. As a result, the recommendation to reject the adoptive parents is made only in cases of severe neglect even though, under different circumstances, the applicants may not have been accepted. The practice of placing a child prior to the application for a licence makes a travesty of existing licensing provisions and results in adoptive parents being chosen by default, rather than by design. One way of controlling this practice would be to make the rejection of a licence a ground for apprehending the child under the child protection provisions. However, as argued earlier, there are good reasons for narrowing the grounds for involuntary intervention. Furthermore, it is virtually impossible to distinguish between informal, private foster care arrangements and other parent-initiated placements that may later result in an application for adoption. While recognizing the right of parents to place their child, the Ministry has a responsibility to ensure that the child's best interests are promoted by an adoptive placement. We realize that this is a difficult issue that may not be easily resolved by legislative means and we would particularly welcome readers' comments and suggestions.

The inadequacy of legal safeguards for the relinquishing parents is another concern frequently raised in connection with private adoptions. For example, the licencee is not now required to ensure that biological parents are informed of their legal position or are provided with support and guidance in considering alternatives to relinquishing the child for adoption. We have already recommended that child and family service agencies be required to tell parents they may receive counselling and legal advice. Likewise, ***we are recommending*** that licencees be required to inform the parent(s) of the opportunity to receive independent counselling and legal advice prior to

consenting to their child's adoption. Since many mothers make that decision while still in the hospital, an added protection would be to encourage doctors to refer the woman to the hospital's social work department if she has not already sought independent advice.

As noted earlier, if the relinquishing parents are under eighteen years of age, the Official Guardian must be satisfied that their consent is informed. For this contact to be a meaningful safeguard for the biological parents and the child, it should occur before the child is actually placed in the adoptive home. Therefore, ***we are recommending*** that the legislation specify that the Official Guardian's involvement must take place prior to the adoption placement.

Earlier, it was recommended that biological parents be allowed to find out whether their child had been adopted. For parents placing their child via the private adoption route, this right is even more important since they are the legal guardians until the child has been adopted. At present, the biological parents are not required to be told whether the application for a licence has been accepted and whether their child has, in fact, been placed with a particular family. Since the parents' original consent may have been contingent upon the knowledge that their child would be placed with a specific family, ***we are recommending*** that all reasonable efforts be made to inform the biological parents that the application for a licence had been rejected.

A final issue relates to the adoptive parents' right of access to the child's social and medical history. At present, the licencee has control over such information but is not required to make it known, either to the person conducting the home study or to the prospective adoptive parents. It could be argued that knowledge of a child's social and medical history would be useful in assessing adoptive applicants for a particular child. Furthermore, prospective parents should probably have a right to information relevant to the decision as to whether they could accept and care for the child (e.g., genetic information). Therefore, ***we are recommending*** that licencees be required to grant the home study person, the adoptive applicants, and the person supervising the adoption, access to the child's social and medical history.

In conclusion, it should be noted that several Canadian provinces (e.g., Newfoundland and Quebec) have banned private adoptions, while another (e.g., New Brunswick) has outlawed third party involvement. In view of the problems discussed above and the fact that private adoption tends to be seen by the public as a service for the elite, abolition is an option that might be considered. One variation would be to continue to allow private adoption agencies, but not to grant licences to private individuals. The potential for abuse appears to be greater for individual licencees who handle adoption as a "sideline" than for

agencies licenced exclusively to carry out this function. Another option would be to allow the parents to place their child, but to prohibit third-party involvement in adoption. The Ministry could be responsible for conducting a home study and approving the placement. It can be argued that abolition of private adoption would result in "black market" transactions. As long as the practice of private adoption is legal, it can be regulated to protect the interests of the child. On the other hand, if it were legally outlawed the practice would, to some extent, still continue albeit without the present legal controls. We would welcome readers' reactions to this issue.

Custom adoptions

Another way to recognize the cultural uniqueness of native people would be to legally sanction custom adoptions. The extent to which this practice exists among Ontario Indians is unknown, as are the exact requirements under the customary laws of the different Indian nations of Ontario. One argument is that it is important for provincial legislation to provide a means of recognizing custom adoptions, but another is that, although the legislative recognition of custom adoptions may be an issue in some parts of Canada, it is not an issue for Ontario Indians.

We are recommending that the possibility of sanctioning custom adoptions be given serious consideration and receive further investigation. A discussion of the various legal and administrative means of validating or sanctioning custom adoptions is beyond the scope of this paper. However, we welcome readers' comments and suggestions regarding the desirability of granting legal recognition to custom adoptions.

B. Foster guardianship

The proposals in this part of the paper assume there are children for whom permanent guardianship vested in long-term foster parents may be a more realistic option than adoption. Let us take, for example, the case of the older child who has lived with one foster family continuously for several years, but continues to have strong emotional ties to his biological parents and past life. The fact that such a child may not want to be adopted does not negate his need for permanence and stability. There may also be children whose relationship with foster parents is of such length and quality that they should not be removed from the home even if they are eligible for adoption. The phrase "psychological parents" is sometimes used to refer to the status such foster parents have in the eyes of the foster child. The foster

parents should be allowed and encouraged to apply to adopt the child. If they choose not to, but wish to become the child's guardians, it may sometimes be better to permit the child to remain where he is, rather than moving him to an adoptive home. For children who may already find it difficult to form close relationships, another disruption can be damaging and stressful.

From the perspective of the agency and the foster parents, it would be desirable to formalize in law an already existing relationship by allowing the foster parents to apply for guardianship of the child. This Ministry's recently released foster care standards recognize the need to shield long-term foster care homes from unnecessary agency intervention. Even now, agencies are reluctant to disrupt stable foster care arrangements, especially if there is little likelihood that an adoptive family can be found for a child. The creation of a foster guardianship status would provide agencies with an additional option for the permanent placement of a child. For the foster parents, foster guardianship would offer security because the child could not be removed from the home, as well as offering the right to assume greater parental responsibilities. Therefore, ***we are recommending*** that foster guardianship be created as a legal status.

Criteria for granting foster guardianship

Foster guardianship may be viewed, either as an alternative to adoption for certain children, or a way of ensuring the security and stability of a foster relationship. Either way, it involves a change in legal status and responsibilities. Thus, the legislation should specify the circumstances under which foster guardianship would be considered, as well as the consequences for the child, the foster parents, the agency and, where applicable, the biological parents. Clearly, it should be considered only for certain children, namely those already in foster care for whom reunion with their biological families is not possible.

We are recommending that foster guardianship be granted only under the following circumstances:

- if the child were subject to long-term guardianship (i.e., Crown wardship) at the time of the application for foster guardianship;

- if the child had been in the foster parents' care for a continuous period of at least two years;

- if the foster parents had demonstrated an understanding and appreciation of their role as foster guardians;

- if the foster parents and the child twelve years of age and over gave consent.

Foster guardianship has been described as a "third best" option since children should, ideally, either be returned to their biological families or, where this is not possible, placed in adoptive homes. It is argued that it may be unfair to deny a child, particularly a very young child, the opportunity to be adopted. On the other hand, as already mentioned, continuity should be an important consideration in deciding where a child should live. There may be situations in which removal from the foster home would be so detrimental to the child that foster guardianship would be preferable to placement in a new adoptive home. However, one should probably question why foster parents would choose to apply for guardianship, rather than to adopt. With the availability of adoption subsidies, the loss of foster care payments should not be a consideration. In order to promote the child's opportunity to be adopted, ***we are recommending*** that adoption by the foster parents be presumed to be preferable to foster guardianship. The application for foster guardianship would have to include the reasons why adoption is not being considered. One anticipated reason is the older child's unwillingness to be adopted because of his ties to his biological family.

Finally, we have recommended that a child must be in a foster family's care for at least two years before foster guardianship can be considered. However, we realize that this time period must, by definition, be arbitrary and we would welcome further suggestions. One possibility would be to establish a shorter time period (e.g., one year) for children under six to conform with a child's relative sense of time. For a young child, a year may be long enough for the foster parents to have become his "psychological parents".

An alternative proposal would be to allow foster guardianship only for children over a certain age (e.g., eight or ten) who do not wish to be adopted. Some people have argued that foster guardianship should not be an alternative to adoption merely because the foster parents do not want to adopt the child. It is felt that, if the foster parents were fully committed to him, they would want to adopt the child. Obviously, the situation would be different if the child chose not to be adopted but wished to remain with the foster parents in a guardianship arrangement. On the other hand, from the perspective of the child's need for continuity and the foster parents' desire to be free from agency supervision, it may be preferable to promote permanence by granting foster guardianship rather than moving the child to an adoptive home. Since we have already recommended adoption by the

foster parents be presumed to be preferable, the onus would be on the foster parents to convince the court that they should become foster guardians. Although we have recommended foster guardianship be available to a wider range of children, we are interested in readers' reactions to the above alternative proposal.

Application for foster guardianship

Since foster guardianship would be a legal status and not merely an informal agreement between the agency and the foster parents, a legal procedure would need to be established whereby foster guardianship could be granted. ***We are recommending*** that the foster parents be allowed to file with the court their application for foster guardianship and that the court be allowed to make a guardianship order without a hearing, by simply reviewing the documentation. However, ***we are recommending*** that a hearing be required if any of the conditions warranting an adoption hearing exist (e.g., if the application is opposed).

Since only Crown wards would be eligible for foster guardianship, parental rights (except, possibly, access) would already have been terminated prior to the guardianship application. However, several questions remain regarding the biological parents' right to notice of the application and to post-guardianship access. ***We are recommending*** that, where the biological parents had access prior to the application for guardianship, they be required to receive notice of the application. This would include situations where there was an outstanding access order or where the parents were regularly visiting the child without an access order. Such a provision would be consistent with the proposed foster care standards promoting parental visits and other forms of involvement. The agency would, of course, also receive notice of the application.

Unlike adoption, foster guardianship does not provide a child with a "new" family. Rather, it protects an already existing stable relationship from agency and parental interference and the possibility of disruption, thereby ensuring continuity for the child. Therefore, unless it were clearly not in the child's best interests it would seem reasonable to allow the biological parents and other persons with whom there has been a pre-existing relationship of some length (e.g., grandparents) to continue to have contact with the child. ***We are recommending*** that any person twelve years of age and over who has a prior existing relationship with the child may apply for post-guardianship access at any point after the guardianship application. Of course, the child himself could also apply. The court would base its decision on whether access would be in the child's best interests and would presume that access should be ordered if a child twelve and

over objects to termination of contact. Since the purpose of an access order is to maintain the child's existing relationships, it is likely that family members, such as aunts, uncles, cousins, would be granted access.

The consequences of foster guardianship

If foster guardianship is to result in a change in legal status, certain expectations need to be established in law. ***We are recommending*** that foster guardianship entail the following:

- the assumption of full guardianship rights by the foster parents (e.g., physical and legal custody of the child, right to consent to medical treatment, etc.);
- freedom from agency supervision, subject to child protection laws;
- a continuation of financial support.

There may be some debate as to whether the long-term guardianship (i.e., Crown wardship) of the child should continue. If the child stayed a Crown ward after the assumption of guardianship by the foster parents, Crown ward reviews would presumably continue to be required. This means that the biological parents and the agency could, as now, request a review of the child's status. On the other hand, it could be argued that Crown wardship status is unnecessarily stigmatizing for children who have legal guardians. Furthermore, both the child and the agency would be placed in an anomalous position if the child continued to be a Crown ward even though the foster parents had full guardianship. ***We are recommending*** that long-term guardianship not continue after the granting of foster guardianship. Also, ***we are recommending*** that there be no possibility for reviews of the child's status, but that the biological parents be permitted to ask for a review of the decision regarding access.

A final issue relates to the involvement of the agency. Since financial support would continue, some method of accountability to the agency would probably be required. One possibility would be to adopt the method used for adoption subsidies and expect the agency to conduct periodic reviews to determine whether there has been a change in the foster guardians' financial circumstances or, alternatively, merely to ascertain whether the child is still living with the family. However, beyond the limited expectation of financial reviews, the agency would only be involved with the family on a voluntary basis, if both the family and the agency agreed.

9

Records and confidentiality

Introduction

While recommendations concerning child and family records were being developed for the Children's Act, two important and relevant documents were released: the Krever Report on health information and the Williams Report on public access to government - held records and personal privacy. As references to these reports within this chapter make clear, the ground covered by the two reports and the proposed jurisdiction for their recommendations do not correspond exactly with the area of jurisdiction recommended in these pages for children's services legislation. However, despite the somewhat different focuses that each of the reports and our recommendations have, and despite the likelihood that the three will not result in legislation at the same moment, it is our assumption that implementation problems will be solved easily and, in preparing these proposals it has been our aim to achieve consistency with the Reports. Of course, the legislation resulting from our proposals will have to be consistent with the government's more general freedom of information legislation being developed in response to the Williams Report. It should also be mentioned that, in preparing these proposals, we have relied on the Ministry's earlier Case Information Disclosure paper and the analysis of the feedback received in response to that paper.

The proposed Act differs from Ontario's current children's legislation in the increased attention it gives to some of the key transition points in the course of a child's service or treatment. The goal is to improve decision-making where the rights of children and families will be affected, and to ensure that all affected parties have the opportunity to be heard when the decisions are being made. Little will appear by way of detailed instructions for the day-to-day provision of service or management of facilities.

By the same token, the legislation will not contain instructions on record-keeping by service agencies; but we do have detailed proposals governing the use and handling of records as children's and parents' rights are affected - in particular, their right to privacy, and their right to know the contents of the record. A right of access to records without a court order is already known in children's services. One example is the right under special needs agreements. We see a right of access to the record as a necessary consequence of our proposals to let the parents and the child aged twelve and over participate in key decision-making. We see protection of privacy - protection from inappropriate dissemination of information in a record - as the child's and family's right, and as something conducive to more effective treatment. Current legislation governing children's services is more often than not silent on access and privacy rights. The practice among service-providers varies widely from agency to agency and is carried out with great uncertainty as to governing principles.

We propose detailed provisions that will clarify who does and who does not have a right of access to records, which disclosures an agency may make, and which it may not, without the consent of the child or parents.

A. Scope

In considering how broad the legislative provisions for access and confidentiality should be, the choice is, by and large, between limiting their application to Ministry-held records, or applying them to the whole range of agencies providing the services governed by the rest of the proposed children's legislation, i.e., all Ministry-funded services. Since a child and parent may be receiving services or care governed by our proposed children's legislation alternately or even simultaneously from Ministry direct-run and from other funded agencies, and since one of our proposals govern the transfer of information from agency to agency when a child moves, the effect of our proposals would be paralyzed at every turn if they did not apply to all providers of children's services. Therefore, ***we are recommending*** that these proposals govern the Ministry, and each service-providing agency or residence, whether Ministry-run or Ministry funded, in these proposals, and inter-agency committees ("agency" is used to mean any of the above). ***We are recommending*** that these proposals govern any records in existence when the proposals come into effect.

B. Record-keeping policy

The quality and type of information about a child or family put in a record will vary enormously from agency to agency. Except for certain minimal data collection requirements such as those contained in the regulations under The Children's Residential Services Act, the law, in general, should not specify the type of information to be contained in agency records. This is appropriately left to the discretion of individual agencies as they respond to a variety of clients and service situations. However, it could be useful for the Act to contain some broad provisions to encourage record-keeping of high quality and consistent with the basic principles in the proposed declaration of principles. ***We are recommending*** that each agency develop a written record-keeping policy to include provisions that, to the greatest extent possible, information shall be gathered from the subject himself; and that it will be the minimum needed to serve the purpose for which it is

gathered. It shall also contain a retention schedule. Parents and children with access rights would be told of the purpose for which information was being gathered; their access rights (Section E); their rights to designate information as unavailable to others (Section F) and to grant or withhold consent to disclosures (Section I).

C. Definition of "records" and of "access"

Some agencies will find the proposals concerning child and parent access correspond, more or less, to the practices they have already established, whereas for others, the proposals may entail changes to present practice. There are circumstances under which an agency might honestly feel it unwise to reveal certain parts of a record to a child or parent, and there are proposals that recognize the need in some circumstances to limit access to the records. Withholding access should be done only in accordance with the legislation, and not through unreviewable practices such as double record-keeping, within the agency. Both sets of records, where two are kept, would be subject to the access provisions in these proposals. Therefore, ***we are recommending*** that "record" means all information gathered or generated by an agency, whether through interviews or written forms, or incidental to provision of service or therapy to a child or family, or as part of reports or evaluations or program plans; and that "access" for child, parent and lawyer accessors means the right to view the record as it is kept, or to get a copy, or both, if the accessor desires. (There may be a need in some circumstances to require payment for the cost of producing the copy.)

D. Commissioner

As noted earlier, the government is developing freedom of information legislation in response to the Williams Report on public access to government-held records. A major proposal in the Williams Report is that disputes concerning records be handled by a third party reviewer, called a Commissioner. It is quite possible that the review procedure for government programs included in the freedom of information legislation would be inappropriate for private agencies funded by the Ministry. Thus, rather than simply applying the review procedure for government programs to private agencies, it may be preferable to establish a separate kind of review. In that event, ***we are recommending*** that, for the purpose of record-keeping and confidentiality in relation to Ministry- funded agencies, a Commissioner be appointed to receive and deal with appeals by children, parents and lawyers from agencies' decisions concerning access; complaints about alleged

errors not corrected; complaints about disclosures alleged to have been made by agencies to persons not specified in the legislation or to those beyond the scope permitted in the legislation. The Commissioner should have the power to order an agency to give or withhold access, to make or cease making disclosure, to alter its disclosure practices, and to remove, add or alter information in the record. It may be necessary to appoint one Commissioner for each of the four Ministry regions.

E. Access by children, parents and lawyers

The Krever and Williams reports do not deal at any length with age as it relates to access rights. For children's services legislation, age-related issues are central. In other areas of this paper and in the existing legislation, children of twelve and sixteen are granted significantly greater rights. Children under twelve are, in general, not considered competent to make decisions or to initiate reviews. Children sixteen and over are considered to be free from involuntary child welfare intervention and to make decisions on their own. Children between the ages of twelve and sixteen are seen as gradually acquiring rights - in general, not yet able to make decisions on their own but entitled to have their views heard in third party reviews if they disagree with proposed decisions (e.g., regarding residential placement). In addition, an earlier proposal suggests that children twelve or older should be able to consent to counselling, but not to other forms of treatment or service. It seems reasonable to take the same general approach with respect to access to records. Fixing ages in the legislation may seem inappropriate and arbitrary to some. Not fixing the ages would simply encourage a continuation of inconsistent practices and force each service-provider to make decisions that may appear arbitrary. We feel that agencies would be better served by legislation that sets specific ages, helping to determine when access to records should be granted. In Section G we propose grounds other than age for denying full access.

Where we speak of a *parent's right* of access or rights regarding consent issues, we include a *legal guardian* or an *agency with guardianship*.

Besides children and parents, there may be others who should have access rights on behalf of children. Although there has been some work on the role of advocates for children, their status has not been defined enough to create an access right in that class of person. In some cases, however, an independent advocate does exist - a lawyer acting for a child. ***We are recommending*** that the following be given access to the child's record, subject to the conditions proposed in

Section F: (1) The child aged twelve or older; (2) The parents of a child not yet sixteen; (3) A lawyer acting for the child. The accessors listed above should be given access to Ministry-held information, such as Tracking System (CAIS) information, that could help in locating records. ***We are also recommending*** that, notwithstanding the access rights proposed here, any accessor and the agency may agree to limited access or to a summary of the record; the agency, in that case, is entitled to a signed statement from the accessor saying that the limited access was accepted in lieu of complete access on that occasion.

F. Child/parent/lawyer access: conditions and limitations

For a variety of reasons, an agency may be reluctant to give a child or parent complete access to a file. Information about siblings and other relatives may appear in a record, as may the name of a third party who supplied information. An agency may find it hard to engage the services of an outside professional if the professional knows that an identified psychological assessment may be shown to the child. An agency may, in good faith, feel that a child, because of immaturity, emotional disturbance or developmental handicap, should not see the record. The agency may feel that letting the parent see what the child has said about the parent, or vice versa, might damage the parent-child relationship or make a reconciliation difficult. The fear that a parent will see the record could possibly inhibit a child from participating in or benefitting from certain treatment or therapy. A parent might hesitate to give useful information. An agency may also fear that access by a lawyer will serve as a back door through which a child might get access – a child not entitled to it because of age, or one from whom the agency would like to withhold some information. There are a number of ways to deal with this latter problem: the agency could withhold from the lawyer information it does not want the child to have. But, for example, if a child were seeking to initiate a review of temporary guardianship, an agency would be put in the position of being able to control the lawyer's access to facts that may be important in the dispute. Another solution is to have the agency identify for the lawyer whatever information it does not want given to the child, and we prefer a solution along this line.

We are recommending that an agency asked by a child or parent for access to a child's record be allowed to withhold parts of the record on the grounds that full disclosure would be harmful to the child. The accessor could appeal the decision to the Commissioner and the onus would be on the agency to explain the perceived harm and to justify

the partial access. ***We are recommending*** that an agency asked by a child or parent for access be able to withhold names and information about third parties where revelation would violate the privacy of those third parties; the names of persons who have provided information about the child but who have provided no treatment and are unaffiliated with any service provider; and the contents of an assessment commissioned by the agency from an outside professional (though the name of the professional would be revealed). ***We are recommending*** that an agency asked by a child's lawyer for access could require the lawyer to agree in writing not to reveal to the child parts of the record specified by the agency. The lawyer should be able to appeal this requirement to the Commissioner. ***We are recommending*** that, when parents supply information to an agency, they could designate as unavailable to the child information which, though it might involve the child, would be sensitive for the parents or personal to them; the agency would have to abide by this designation; that an older child would be allowed to designate as unavailable to his or her parents information gathered from the child in individual or group therapy sessions not attended by the parents; the agency would have to abide by this designation. This does not mean the file containing the child's record would have to be separated by designation but that the designations could simply be noted in the appropriate places in the record.

G. Response time

It is not easy to establish a time within which an agency must respond to an access request from a child, parent or lawyer suitable both for records held centrally by the Ministry and for those held by a small group home. One suggestion for government-held records is 30 days, with the possibility of extending it to another 30. Ministries are large recordholders; but most children's records are held by agencies whose size does not justify 30 or 60 days. Many stays in a residence, and the duration of many services, are shorter than 60 days. Since access to records is meant to support participation in decisions concerning moves and changes (among other things), a speedier response is necessary. In most cases there is no administrative need for 30 days, and in many, a 30 day wait would be tantamount to denying access until after the need for it had passed. ***We are recommending*** that the agency be obligated to respond to an access request by a child, parent or lawyer as soon as possible, and in all events, within 30 days.

H. Correction of errors

Errors may creep into records. Errors such as an inflated age on which test scores are based, or incorrect information about involvement with the law clearly should not be allowed to stand if it is identified and confirmed. Another question concerns past disclosures of information now found to be incorrect. There may be a large number of recipients of incorrect information over a long period of time. The errors may be trivial; many past recipients may have long since discarded the information. But the error may not be trivial and it may still be relied upon. ***We are recommending*** that, if a child or parent asks that an alleged error be corrected, the agency should either make the correction or, if it disagrees, note the dispute in the record. If it makes the correction, and if, in the agency's opinion, the error was likely to lead another agency holding the incorrect information to actions, decisions or judgements that could be harmful to the child (for instance, an intelligence assessment based on an accidentally inflated age), the agency should inform the other agency or agencies of the error.

I. Consents required for disclosures not provided for in the legislation

A strong element in the Krever and Williams reports is the protection of individual privacy. Krever recommends, for example, that a patient, when transferring from one hospital to another, should be given an opportunity to veto the transfer of information from the hospital he is leaving to the one to which he is going. Krever balances privacy rights against convenience for health facilities and finds privacy interests paramount. So does Williams in balancing privacy against the public's right to access to government-held documents. This paper too, has to consider where to strike the balance between the needs of service-providers and others, and privacy rights. ***We are recommending*** that, in general, disclosure of a record to third parties should not be permitted without the consent of a parent and/or child who is entitled to access to the record (see Section F, above). Exceptions to this general rule would be: (1) if a child of any age has been found mentally incompetent in a written assessment by a licensed psychologist or physician; in such a case the agency should provide access to the subject's record to his parents or, in the absence of the actual parents, to the nearest relation who in the opinion of the agency demonstrates a deep interest on the subject's care; and (2) situations outlined in Section J.

J. Use or disclosures of information in child's record allowed or required, without consent of child and parent

In accordance with the goal of this paper to spell out those procedures that touch on the rights and fundamental interests of the parties affected by the provision of children's services, it is proposed to list in the legislation those uses and disclosures an agency may or must make of the record without obtaining the child's/parents' consent. There are five broad categories: (1) use within the agency; (2) permitted disclosures to the next service or agency receiving the child; (3) permitted disclosures to help deal with an emergency; (4) permitted disclosures authorized under special guidelines and agreements; and (5) mandatory disclosures.

1. It makes no sense to require consent for use of the record by the agency providing service or engaging in follow-up activity. The choices are for the legislation to remain silent on the topic; to provide broad authorization for use; or to provide detailed authority for the agency to deal with its own records; this authority though broad, would recognize the fact that, in large institutions at least, there would be employees who would have no reason to use the child's record. ***We are recommending*** that an agency be allowed to disclose, without any consents, the contents of a child's record to its own employee who is providing service or care to a child; who is the agency's record keeper; or who is responsible for carrying out a review or a study involving the child's information, accommodating legal requests for information in the records, carrying out follow-up activity or dealing with the record in accordance with retention schedules.

2. Disclosures to the next agency receiving a child is a more difficult issue. Does an agency receiving a child have a right to the convenience of some "start-up" information or should the parent/child have the option of barring any such disclosure? ***We are recommending*** that an agency be allowed to disclose, without consent, information to the next agency taking the child, but only of a type and to an extent necessary to allow the receiving agency to carry on providing service. This may include information about special medical risks to which the child is subject, and information bearing on a child's being a danger to self and others. The agency should also be able to disclose enough information to another agency or committee of agency representatives to enable it to decide whether its programs would meet the needs of the child.

3. Emergencies sometimes arise that can be better and more quickly dealt with if certain information is available. Should an agency be allowed to make disclosures to respond to an emergency? For whose ultimate benefit should the disclosure be allowed – the child's? the public's? the agency's? Should the emergencies dealt with be of a medical nature only or on law-enforcement matters as well? Should an agency be allowed, or required, to disclose the information? What harm is to be prevented – danger to life, inconvenience to an agency or the police? The intention is not to create a duty in the agency to protect the world at large from any danger a child in care might present. The question is whether to protect the agency from the claim that it violated the child's privacy rights if it chooses to disclose information under this heading. We feel that, in order to protect the agency, there should be a permissive heading of consentless disclosure for serious emergencies. ***We are recommending*** that an agency be allowed to disclose without consent to the police or to a medical worker or institution such information as the agency has reasonable grounds to believe could help prevent the subject or some other person from suffering serious bodily harm or danger.

4. Independent of these recommendations, the Ministry is in the process of developing guidelines to govern access to records by researchers and auditors and to govern certain disclosures to adult corrections authorities. We propose to allow for these in the legislation. Researchers cannot, as a practical matter, always rely on obtaining the subject's permission, and requiring consents would make impossible the conduct of studies based on large random samplings. ***We are recommending*** that an agency, without consent, be allowed to disclose, to adult corrections authorities and to researchers, certain information in children's records as permitted under Ministry guidelines or agreements entered into by the Minister.

5. ***We are recommending*** that the agency be required to give access to the child's record to a Ministry employee performing a study, investigation or review involving the child's record; to the Commissioner; to a placement review body; to anyone authorized under other legislation; and in response to a court order or a warrant. This would be subject to the provisions of other legislation, such as Section 26a of the Mental Health Act, which contains special rules governing the disclosure of clinical records.

K. Recording cases of access and disclosure

It is part of a child's and parents' right to make his wishes known at critical decision-making points and to have the right to privacy. Necessary to both is having some idea of "who knows what" about

the child and parent. Therefore, ***we are recommending*** that every instance of access to the record, and every instance of disclosure, be logged in the record and become part of it, except for use of the record by the agency holding it while the agency is providing service to the child.

L. Liability

The Krever Report is strongly in favour of supporting its access and confidentiality provisions with sanctions and so are we. We borrow the dollar amount suggested by the Krever Report, not because there is any magic in that figure, but because we feel that the sanctions should be the same, whatever they may be, when more general health record legislation is developed. ***We are recommending*** that a child or parent whose record is, in whole or in part, disclosed contrary to any provision in this proposed Act, be entitled to sue for greater proven damages or $10,000; and that the following be offences:

- soliciting or making disclosures that are unlawful in the proposed Act;
- failure to comply with a Commissioner's order;
- maintaining double files for the purpose of concealing the existence of records from children, parent, and lawyer accessors;
- not complying with designations made under the proposals in Section F.

Summary of recommendations

The following summary of recommendations presents many of the recommendations in a shortened form, rather than repeating them exactly as they appear in the paper. Page numbers are included to make it easier to find the exact wording. Also, some relatively minor recommendations are not included in this summary.

Introduction

1. The Act should be entitled The Children's Act. (p. 9)

1. Declaration of principles

1. The Act should contain a declaration of those principles underlying the legislation and reflecting the Ministry's basic approach to children's services (e.g., services should support the family, wherever possible, rather than compete with it by providing alternative care and supervision). (p. 14)

2. The least restrictive alternative principle should be defined as an approach to service delivery that involves a preferential ordering of where and how services should be provided to children and families. (p. 16)

2. The flexible service system

1. The Minister should have the authority to establish local Children's Services Coordinating and Advisory Groups and to make regulations regarding the details of their operation. (p. 22)

2. The Ministry should be able to establish or fund the following major types of services: family support, residential care, child and family service, child development, youth work. (p. 23)

3. An agency should be able to provide more than one of the five major types of services. (p. 25)

4. Regulations under the Act should contain general rules for each of the major service types in order to regulate who could receive funds to provide one of these services. (p. 26)

5. Where sufficient numbers of native children and families are being served by an agency, the agency's board of directors should include native people representative of the local community. (p. 26)

6. The Minister should have the authority to establish an Indian child and family service agency to serve Indian children and families living on a reserve. (p. 26)

7. Miscellaneous services that do not fit within the major types should be covered by the Ministry's broad authority to purchase services for children and families, proposed below. (p. 27)

8. The Minister should have the general authority to make, by regulation, categories of licensable services. (p. 27)

9. The multitude of funding provisions scattered throughout the several existing Acts should be replaced by a broad authority of the Minister to fund services for children and families within the scope of the Act. (p. 29)

10. The Ministry should have a maximum degree of flexibility in determining who will receive funds to provide services and under what terms and conditions. (p. 30)

11. The Act should, in general terms, require that the Ministry purchase such services as may be required to carry out orders made by a court or a placement review body (discussed in Chapter 3). (p. 31)

12. For the life of a service contract, certain extraordinary, coercive or involuntary powers should transfer to persons or agencies that require them in order to carry out their tasks (e.g., a secure detention home). (p. 32)

3. Voluntary access to services

1. For children under sixteen years of age, only the parents' consent should be required for the provision of support services; the views of the child, where they could be ascertained, should also be taken into account. (p. 41)

2. Children sixteen years and older should be able to consent to support services on their own. (p. 41)

3. If a child, twelve and older, sought counselling services for himself, he should be permitted to consent on his own. (p. 42)

4. In the situation described in #3 above, the counsellor should be required to discuss with the child the desirability of informing or involving the parents. (p. 42)

5. The consent of the parents of children under twelve years of age would be the only one required for the child's admission to long-term residential care; the child's views, where ascertainable, should be taken into consideration. (p. 43)

6. Both the child and his parents should be required to consent to admission of children between twelve and fifteen years of age to long-term residential care; if the child's consent could not, for whatever reasons, be obtained there should be a third party review of the admission decision. (p. 44)

7. Children sixteen years of age and older should be able to consent to their own admission to residential care. (p. 44)

8. Only the parents' consent should be required for the provision of services to children under sixteen, while in residential care. (p. 44)

9. The consent requirements for admission should also apply to transfer and discharge decisions. (p. 45)

10. A child should be given a reasonable opportunity to speak to an independent advocate prior to signing a consent form. (p. 45)

11. In order to ensure a valid consent, necessary translation or interpretation services should be made available to a child and his parents. (p. 46)

12. The development of support services should be promoted by means of a broad definition and flexible funding provisions and eligibility criteria, rather than by rigid legislative rules. (p. 46)

13. Support services should be broadly defined to include non-residential and short-term residential services. (p. 47)

14. A residential stay of six weeks or less should be considered "short-term"; anything longer should be defined as "long-term". (p. 47)

15. A service provider should be able to provide a support service to all or part of a family unit and to individual children living independently. (p. 48)

16. Decisions regarding the admission, discharge, and transfer of children in long-term residential care should be subject to review by an independent and impartial placement review body. (p. 54)

17. The legislation should specify when the placement review body should conduct an informal hearing, rather than some other form of review. (p. 56)

18. Pre-admission hearings should be required for all admissions to institutions for all children six and under, or if the child twelve and older does not consent to admission. (p. 58)

19. An "institution" should be defined as a self-contained facility in which ten or more children live. (p. 59)

20. The placement review body should conduct a review, within one year of admission and every year thereafter, of all children in long-term residential care on the consent of their parents. (p. 60)

21. The decision to admit a child to long-term residential care should be based on the following criteria: the child had a special need; the program proposed for the child was available and will likely benefit him; and no less restrictive alternative was feasible. (p. 61)

22. The decision to allow a child to remain in care should be based on the following criteria: the child had a special need; he was benefitting from the program; and no less restrictive alternative was feasible. (p. 61)

23. The child's need for continuity of care should be a consideration in all transfer decisions. (p. 61)

24. The placement review body should have the authority to order that a non-residential service be offered to a family, if that is a less restrictive and more appropriate alternative to long-term residential placement. (p. 62)

25. The placement review body's discretion to order a non-residential service should be restricted by: limiting the amount which may be spent and requiring the child to be otherwise eligible for long-term admission. (p. 62)

26. The parents and the child twelve and older should be able to appeal to the Ministry any decision by the placement review body. (p. 63)

27. A pool of people should be created, from which the placement review body would assign one or more persons to a review. (p. 64)

28. Prior to accepting a child for placement under a voluntary care agreement (i.e., care-by-agreement), the child and family service agency should conduct an inquiry to determine whether: the child was otherwise likely to be in need of protection; there were less restrictive alternatives; and an adequate placement was available and would likely benefit the child. (p. 65)

29. When a child was accepted for placement under a voluntary care agreement, a written agreement with the following statements should be required: that the placement was completely voluntary; that the

parents had concluded they could not care for the child at home; and that child protection proceedings might be considered if the parents were unable to resume custody at the end of a year. (p. 66)

30. The parents should be permitted to designate another person to perform the parental role vis-a-vis the child in voluntary care, if they were unable to do so. (p. 66)

31. Child protection proceedings should be considered if parents refuse to maintain contact or perform any other parental function while their child was in care under a voluntary care agreement. (p. 67)

32. If a child was accepted for long-term residential care, a written agreement should be required, similar to the voluntary care agreement (see #29 above). (p. 68)

33. If the parents of a child in long-term residential care could not be found to consent to needed medical treatment or social services, the facility should have an obligation to contact a child and family service agency, which must consider child protection proceedings. (p. 69)

34. Parents should have the right to refuse medical treatment or social services for their child in long-term care unless the absence of treatment or services would result in the child being in need of protection. (p. 70)

35. If an agreement regarding transfer or discharge could not be reached, the parents, the child twelve and older, or the facility should be able to bring the matter to the placement review body for resolution. (p. 71)

36. The placement review body should have the authority to appoint an interested person to play the parental role (e.g., participate in the child's plan of care) if the parents were unwilling or unable to assume this role. (p. 72)

37. Where future parental uninvolvement was identified at admission, the facility should have a duty to contact the placement review body, which should be required to conduct a review within six months of admission. (p. 72)

38. A hard-to-serve process or mechanism should be available in all areas of the province to assist children and families to obtain an appropriate service, if they had been unsuccessful in securing a service for themselves. (p. 73)

4. Children in need of protection

1. The present definition of a child in need of protection should be replaced by grounds that are more precise, objective and that focus on serious harm or risk of such harm to the child. (p. 80)

2. Before a court made an order to which the parents were consenting, the parents should be given an opportunity to consult a lawyer and the court should make an inquiry to determine whether or not the consent was informed and voluntary. (p. 82)

3. If the court concluded that the provision of a support service could prevent a child from being removed from his parents, the court should be able to order the agency to provide the service; regulations would limit this authority (e.g., by placing a ceiling on the cost of the ordered service). (p. 82)

4. The reporting provisions should be simplified to state that all persons, including professionals and officials, would be under a duty to report any child they had reasonable grounds to suspect fell within the revised definition of a child in need of protection. (p. 83)

5. "Professional" and "Official" should be clarified by listing the types of occupations included within these terms. (p. 83)

6. The professional reporting duty should include the duty to provide all information that formed the basis of the professional's suspicion that a child had been abused. (p. 84)

7. The authority of a child and family service agency to apprehend a child without court authorization should be limited to emergency situations. (p. 85)

8. The Act should state a strong preference for using the least restrictive or drastic means of bringing the matter to court. (p. 85)

9. The Act should provide that the child remain with or be returned to his parents during an adjournment period unless the agency could show reasonable grounds to believe that (a) one of the grounds for intervention was met and (b) no other arrangement was available to protect the child during the adjournment period. (p. 86)

10. The court should have the explicit authority to order agency supervision of the family during an adjournment period if the court found that otherwise the child would have to be removed from the home. (p. 86)

11. Before ordering an adjournment, the court should be required to consider the effect on the child of any delay in the final disposition of the proceedings; in addition, the court should be required to make a final order within a certain number of months from the commencement of the proceedings (e.g., three months). (p. 87)

12. Evidence that might be relevant at disposition, but irrelevant to the issue of whether the grounds for intervention had been met, should not be admitted until the court made a finding that the child was in need of protection. (p. 87)

13. The Act or the regulations should specify the basic elements of the agency's dispositional plan. (p. 88)

14. Two factors should be added to the definition of best interests of the child: the harm or risk to the child justifying intervention and the child's cultural background. (p. 89)

15. The court should be required to apply the least restrictive alternative principle as reflected in the following dispositional guidelines:

(a) a child should not be removed from his home unless the court is satisfied that in-home services and other less restrictive alternatives had either failed, been refused by the parents or were inadequate to protect the child;

(b) if a non-residential service could prevent a child from being removed from his home, the court should order the agency to provide the service;

(c) if removal was necessary, it should be presumed that placement with a relative or neighbour or some other member of the child's own community was preferable to placing the child in the care of the agency;

(d) Crown wardship should not be ordered unless the court finds there is little likelihood that conditions would be remedied so that the child could return to his parents. (p. 90)

16. The terms temporary guardianship and long-term guardianship should replace the terms society wardship and Crown wardship. (p. 91)

17. If a temporary guardianship order were made, the parents should retain the right to consent to major medical decisions (unless the failure to give such consent was the basis of the order) and to the child's marriage unless the court found the parents' refusal to consent would be detrimental to the child. (p. 91)

18. If the court made a temporary guardianship order, it should also make a parental access order, unless the court finds that parent-child contact would be detrimental to the child. (p. 92)

19. If the court made a long-term guardianship order, the court should presume that access would be appropriate where:

(a) at the time of disposition, permanent family placement was not planned or possible and parental access would not impair the child's opportunity for a permanent placement in a family setting;

(b) a child twelve or older wished to maintain contact with his parents; or

(c) the child was to be placed with a family willing to provide permanent care but not wishing to adopt. (p. 92)

20. Under certain circumstances, parents and older children should be entitled to a status review within six months of the order; child and family service agencies should have a review procedure to hear complaints from their clients. (p. 93)

21. In addition to the best interests factors, the Act should specify other factors for the court to consider in making a status review decision (e.g., which services have been provided to or offered to the parents). (p. 93)

22. The expected date of termination should also be considered, if the court concluded that intervention could not be terminated at the time of the hearing. (p. 93)

23. The placement of a child by the agency should be in the least restrictive alternative, as defined in the proposed Declaration of principles. (p. 94)

24. The placement of a child outside Ontario should not be permitted unless the Director of Child Welfare was satisfied that extraordinary circumstances justified such a placement. (p. 94)

25. There should be an independent, pre-admission review of the decision to place a child found to be in need of protection in an institution. (p. 95)

26. A child in the care of an agency should be permitted to communicate with his lawyer without the consent of the agency. (p. 95)

27. Serious consideration should be given to including in the Act specific provisions that clarified the role of the lawyer in child protection proceedings. (p. 96)

28. Serious consideration should be given to establishing lay panels to sit with judges hearing child protection cases; such a panel system could include a special roster of native people for cases involving native children. (p. 99)

29. A child and family service agency serving native families should be required to consult with native organizations within its local area on the delivery of services. (p. 100)

30. The chief of a status Indian child's band should be entitled to notice of and legal standing in child protection proceedings involving a status Indian child. (p. 101)

5. Young offenders

(The following are not actually recommendations but, rather, are anticipated provincial positions as indicated by an inter-ministerial committee's consultation paper entitled *Implementing Bill C-61, The Young Offenders Act*, summarized in this paper).

1. "Sexual immorality" would not be an offense in Ontario. (p. 111)

2. The court which would be designated to hear cases under the YOA (i.e., the "youth court") would be the family court. (p. 113)

3. The Minister of Community and Social Services would be designated as the "provincial director", an official who has a variety of responsibilities related to dispositions under the YOA (e.g., making custody placements); the Minister's duties would be delegated to area managers within the Ministry. (p. 114)

4. Probation and after-care officers would be designated as "youth workers". (p. 114)

5. Alternative measures, such as diversion programs, would not be endorsed at this time, but there will be further study of programs in Ontario and elsewhere; the Government will continue its strong commitment to delinquency prevention programs; and there will be inter-ministerial cooperation on the development of guidelines for police discretion. (p. 116)

6. Ontario's designated places of secure custody would include a wide range of facilities which can provide security through either the physical design (e.g., a locked training school) or the control by staff (e.g., certain group homes which have a large number of staff in proportion to the number of residents). (p. 121)

7. Review of custody dispositions would probably be conducted by the youth court, not a review board. (p. 124)

6. Rights and responsibilities of children in care

1. Certain fundamental rights of children in care should be specified in the legislation and protected from violation by a strong enforcement mechanism. (p. 126)

2. The following rights should be included in the legislation: the right to communicate; the right to privacy and individualization; the right to freedom from corporal punishment; the right to adequate care and services; the right to reasonable opportunity to participate in religious activities; the right to be heard; the right to be informed of rights and responsibilities. (p. 127)

3. The enforcement mechanism should include: access to an internal complaints procedure; access to the program director; and finally, access to an external, impartial person (i.e., a complaints officer). (p. 128)

4. The following responsibilities of children in care should be included in the legislation: respect for the privacy and personal possessions of others; participation in the plan of care; adherence to house rules; and refraining from damaging property and injuring others. (p. 130)

7. Extraordinary measures

1. The Minister should designate certain intrusive procedures as "prohibited" and others as "regulated". (p. 133)

2. Intrusive procedures should fall within the residential standards relating to "harsh or degrading" measures. (p. 133)

3. An internal review body (e.g., inter-disciplinary team) should be established in all residential and non-residential programs that involve the use of intrusive procedures. (p. 133)

4. The provisions regarding secure isolation and secure treatment, as contained in the proposed Secure Services Act, should be incorporated into The Children's Act. (p. 136)

8. Adoption and foster guardianship

1. In order to determine that adoption is in the child's best interests, the court should be satisfied that: the child's physical and emotional well-being would be promoted; and that prospective adoptive parents had demonstrated an understanding of their role as parents of a child not born to them. (p. 141)

2. The consent of the child twelve and older should be required and the views of the child under twelve, if ascertainable, should be taken into consideration. (p. 142)

3. If the child had been in the foster parents' care for six months or more, it should be presumed they had a preference in adopting the child. (p. 143)

4. Single, separated, divorced or widowed applicants should be permitted to adopt a child, without the necessity of showing special circumstances. (p. 144)

5. Partners in a common-law union of five years or more should be permitted to apply jointly to adopt a child. (p. 144)

6. The agency should be required to inform the parents of the opportunity to receive counselling and independent legal advice prior to surrendering a child for adoption. (p. 145)

7. The child twelve and older should be required to receive independent counselling and legal advice prior to consenting to adoption. (p. 145)

8. Parental consent to adoption should be dispensed with only if the person demonstrated an intent to forego his parental rights. The following should be presumed to constitute evidence of such an intent: failure to communicate with or visit the child or the child's custodian for one year; and, in the case of a newborn, failure to visit or communicate with the child's mother for six months. (p. 146)

9. The legislation should not permit the court to order that the members of the biological family have access to the child after adoption. (p. 147)

10. The legislation should include a statement of the legal relationship between the adoptive parents and the child that would replace the present "as if born to" concept. (p. 148)

11. The parents should be informed of their right to know whether their child had been adopted. (p. 148)

12. The present definition of "parent" should be repealed and replaced by a list of persons required to consent. (p. 148)

13. In the case of private adoptions, licencees should be required to inform the parents of the opportunity to receive independent counselling and legal advice prior to consenting to their child's adoption. (p. 150)

14. All reasonable efforts should be made to inform the biological parents that the application for a licence had been rejected. (p. 151)

15. Private adoption licencees should be required to grant both the home study person and the adoptive applicants access to the child's social and medical history. (p. 151)

16. Consideration should be given to the possibility of legally sanctioning custom adoptions, as practised by Indians in Ontario. (p. 152)

17. Foster guardianship (i.e., permanent guardianship vested in foster parents) should be created as a legal status. (p. 153)

18. Foster guardianship should be granted only under the following circumstances: the child was already the subject of long-term guardianship (i.e., Crown wardship); the child had been in the foster parents' care for two continuous years; the foster parents had demonstrated an understanding of the role of foster guardians; and the foster parents and the child twelve and older consented. (p. 153)

19. Adoption by the foster parents should be presumed to be preferable to foster guardianship. (p. 154)

20. The foster parents should be allowed to file their application for foster guardianship with the court; a formal hearing should be required only under certain circumstances (e.g., if the application was opposed). (p. 155)

21. The biological parents should receive notice of the application for foster guardianship if they had access prior to the application. (p. 155)

22. Any person twelve or older who had a prior relationship with the child should be permitted to apply for post-guardianship access. (p. 155)

23. Foster guardianship should entail the following: the assumption of full guardianship rights by the foster parents; freedom from agency interference; and a continuation of financial support. (p. 156)

24. Long-term guardianship (i.e., Crown wardship) should not continue after the granting of foster guardianship. (p. 156)

9. Records and confidentiality

1. The Act's provisions relating to records and confidentiality should govern the Ministry, Ministry-run or Ministry-funded agencies and residences, and inter-agency committees ("agency" is used to describe all of these in the other recommendations). (p. 159)

2. Each agency should be required to develop a written record-keeping policy that must include provisions that, to the greatest extent possible, information would be gathered from the subject himself; and that it will be the minimum needed to serve the purpose for which it was gathered. (p. 159)

3. A Commissioner should be appointed to deal with appeals from agencies concerning decisions about access, complaints about errors, and complaints about unauthorized disclosures. (p. 160)

4. Subject to limitations proposed below, the following persons should have access to a child's record: (a) the child aged twelve or older; (b) the parents of a child under age sixteen; (c) a lawyer acting for the child. (p. 161)

5. An agency should be able to withhold part of a child's record from the child or parent on the grounds that full disclosure would be harmful to the child; this decision could be appealed to the Commissioner. (p. 152)

6. An agency should be able to withhold information about third parties where revelation would violate the privacy of those third parties. (p. 163)

7. The agency should be able to require a lawyer to agree in writing not to reveal to the child parts of the record specified by the agency; the lawyer could appeal to the Commissioner. (p. 163)

8. The parents could designate as unavailable to the child information sensitive for the parents or personal to them; similarly, the older child could designate as unavailable to his parents information gathered from him in individual or group therapy sessions not attended by his parents. (p. 163)

9. The agency should be required to respond to an access request by a child, parent or lawyer immediately, if possible, and in all events within 30 days. (p. 163)

10. In general, disclosure of a record to third parties should not be permitted without the consent of a parent and/or child who was entitled to access to the record. Exceptions to this general rule would be: (1) if a child of any age has been found mentally incompetent in a written assessment by a licensed psychologist or physician, the agency would provide access to the subject's record to his parents, or in the absence of actual parents, to the nearest relation who, in the opinion of the agency, demonstrated a deep interest in the subject's care; and (2) situations outlined in Section J. (p. 164)

11. An agency should be able to disclose, without consent, the contents of a child's record (a) to its own employees; (b) to the next agency providing service to the child; (c) to the police or a medical worker or institution, such information as it had reasonable grounds to believe could prevent serious bodily harm or danger to life; (d) to adult correctional authorities in accordance with Ministry guidelines; (e) to a Ministry employee performing an investigation involving the child's record; (f) to the Commissioner; (g) to a placement review body; (h) to anyone legally authorized to have access to the record (e.g., under a court order or warrant). (p. 165)

12. A child whose record was disclosed contrary to the Act should be entitled to sue for $10,000 or greater proven damages; and the following should be offenses: (a) soliciting or making disclosures unlawful in the proposed Act; (b) failure to comply with a Commissioner's order; (c) maintaining double files for the purpose of concealing the existence of records; (d) not complying with the designations made under the proposals in Section F. (p. 167)

Participants in the development of the paper

Ministry Working Group

Dick Barnhorst, Project Director
David Draper
Avrum Fenson
Christa Freiler
Nancy Goldwarg
Ellen Kachuk
Heather Katarynych
Barbara Landau
Steve Schenke
Shari Stein

We would like to thank the following for their valuable comments in the early stages of the development of this paper:

Ministry Regional Committees

Central Region
Northern Region
Southeastern Region
Southwestern Region

Organizations

Child in the City
Children's Psychiatric Research Institute
Extend-a-Family
Family Court Clinic Resources Committee
Family Law Collective, Law Union of Ontario
Justice for Children
Law Reform Committee, Family Court Judges
Ministry's Children's Policy Development Unit
Ontario Association of Professional Social Workers
Ontario Welfare Council
Southwest Regional Centre
Thistletown Regional Centre

Individuals

Omer Archambault, Ministry of the Solicitor General (Canada)
Nick Bala, Faculty of Law, Queen's University
Doug Barr, Metro Toronto Children's Aid Society
Joseph Bovard, Lawyer
Jack Byles, Department of Psychiatry, McMaster University
Barbara Chisholm, Child Welfare Consultant
David Cruickshank, Faculty of Law, University of Calgary
Bernard Dickens, Faculty of Law, University of Toronto

Participants in the development of the paper

Anthony Doob, Department of Criminology, University of Toronto
Mary Dunbar, Lawyer
Orville Endicott, National Institute on Mental Retardation
Pat Erikson, Addiction Research Foundation
Bill Eull, Dellcrest Children's Centre
Morty Fine, Probation and After Care
John Gandy, Faculty of Social Work, University of Toronto
Ralph Garber, Faculty of Social Work, University of Toronto
Nancy Green, Operational Support, Ministry of Community and Social Services
Dorothy Harrison, Metro Toronto Children's Aid Society
Angus Hood, Ontario Association of Children's Mental Health Centres
John Ireland, Canadian Mental Health Association
George Kennedy, Ontario Association for the Mentally Retarded
Mary Kovaks, Psychologist
Joanne Leatch, Parkdale Community Legal Aid Clinic
Anita Leggett, Lawyer
Heino Lilles, Faculty of Law, Queen's University
Barry Lowes, Training Schools Advisory Board
Grant Lowery, Central Toronto Youth Services
Carla McKague, Advocacy Resource Centre for the Handicapped
Clay Moore, Surrey Place
Brad Morse, Faculty of Law, University of Ottawa
David Peltz, Huntley Youth Services
Bob Pond, Syl Apps Youth Centre
Carl Rubino, Surrey Place
Brian Salmers, Mercury Youth Services
Sandra Scarth, Huntley Youth Services
Anne Silverman, Lawyer
Wallis Smith, Policy Services, Ministry of Community and Social Services
Tom Sterritt, Ministry of the Solicitor General (Canada)
Rick Stubbert, Mercury Youth Services
George Thomson, former Associate Deputy Minister, Ministry of Community and Social Services
Wynn Turner, Probation and After Care
Robin Vogl, Metro Toronto Children's Aid Society
Andrea Walker, Legal Services, Ministry of Community and Social Services
Chris Webber, formerly of Mercury Youth Services
Michael Wheeler, Faculty of Social Work, McMaster University
Jeffery Wilson, Lawyer
Gordon Wolfe, Huntley Youth Services
Alan Wolfish, Child Representation Program, Official Guardian
Harry Zwerver, Ontario Association of Children's Aid Societies